THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

1 In general the acts and omissions of the Office of the Director of Public Prosecutions (ODPP) may be within the terms of reference:

1.1 To the extent that the ODPP had a role in the murder investigation

1.2 In relation to prosecution decisions, to the extent that they shaped the murder investigation.

Submissions by the Public Prosecution Service

See comments at §2 in this Part, below.

2 The test is whether the acts or failures to act demonstrate a want of due diligence. It is not a function of the Inquiry to say whether they were right or wrong. The test is analogous to the lawfulness of acts or omissions by a public body e.g. did the ODPP take reasonable steps to inform itself.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We agree that these matters fall within the Inquiry's terms of reference.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions raise at a number of junctures the question of whether particular decisions of the ODPP are within the Inquiry's Terms of Reference. The PPS makes general submissions on this issue, set out immediately below, and, where appropriate, specific submissions in relation to the issue as it arises in the course of Inquiry Counsel's Closing Submissions. In so far as the PPS has addressed substantive issues which, in its submission, are outside the scope of the Terms of Reference, this does not imply any recognition that these issues properly fall to be considered by the Panel.

The Terms of Reference and the Secretary of State's letter of 4 November 2008

2. The Terms of Reference of the Inquiry are:

> *"To inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations."*

3. The Secretary of State for Northern Ireland set out his view of the Terms of Reference in a letter dated 4 November 2008, which states in material part:

> *"the actions of the DPP and his staff are already within the jurisdiction of the Inquiry insofar as they relate to the investigation of Robert Hamill's death. … If as the Inquiry say is possible the investigation was shaped by prosecutorial decisions of the DPP, that can also be subject of inquiry without it being necessary for the Inquiry to reach conclusions as to the merits of such prosecutorial decisions. … the Secretary of State takes the view that the merits of the prosecutorial decisions taken in relation to the death of Robert Hamill constitutes a discrete matter which can be distinguished from the Inquiry's existing Terms of Reference without causing significant prejudice to the operation of the Inquiry."* (§§16-17)

4. Whilst it is, of course, for the Inquiry to interpret and determine the scope of its Terms of Reference, the PPS understands that the Inquiry has adopted the Secretary of State's interpretation as set out above.

The potential areas of criticism of the ODPP

5. The potential areas of criticism of the ODPP fall into three broad categories:

a. Alleged failures of the ODPP to advise or direct further inquiries;

b. Decisions whether to prosecute an individual or continue with a prosecution;

c. Subsidiary prosecutorial decisions.

6. The PPS sets out below its submissions on the extent to which decisions in each of these categories fall within the Inquiry's Terms of Reference.

<u>Alleged failures of the ODPP to advise or direct further inquiries</u>

7. Without prejudice to its submissions, set out below in response to §7 in this Part, about the division of responsibility between the Police and the ODPP, the PPS agrees that the Terms of Reference encompass any allegation that the ODPP, in exercising its prosecutorial functions, ought to have advised or directed the RUC (or any other agency) to conduct any further inquiries necessary in order to reach an informed decision on the prosecution of any individual for any offence.

8. There are two issues which arise in relation to alleged failures of this type:

a. Whether or not the ODPP was, in the particular circumstances, under a duty to issue advice or direction;

b. If so, whether the conduct of the ODPP demonstrated a want of due diligence (in the sense of a failure to take reasonable steps to inform itself).

Inquiry Counsel's Closing Submissions appear to adopt this approach: see, for example, §8, below in this Part.

Decisions whether to prosecute an individual or continue with a prosecution

9. This aspect of ODPP decision-making is encompassed in decisions to issue directions to prosecute (or not to prosecute) or to bring a prosecution to an end. The question at this juncture is whether and to what extent the Terms of Reference permit a consideration of the merits of such decisions (i.e. the assessment of whether the evidence was sufficient to give rise to a reasonable prospect of conviction and whether such prosecution was in the public interest, the selection of appropriate charge(s), or the discontinuance of a prosecution).

10. The PPS does not accept that the Terms of Reference are broad enough to permit any determination of the merits of a decision whether to prosecute or to continue with a prosecution. The PPS adopts the interpretation given by the Secretary of State, set out above, which it understands to mean that:

a. The question whether a decision whether to prosecute or to continue with a prosecution "shaped" the investigation into Robert Hamill's death can properly be the subject of inquiry within the Terms of Reference.

b. A prosecutorial decision can be said to have "shaped" the investigation if, in consequence of the decision, further or other investigative steps would or should have been taken.

c. Even where such a decision can properly be said to have "shaped" the investigation, the Terms of Reference do not permit any determination of the merits of the decision made by the ODPP.

11. For the avoidance of doubt, the PPS does not accept that the Terms of Reference permit a finding on the merits of decisions of this nature, on any standard of review. By that the PPS means any consideration of the correctness or reasonableness/rationality of the decision itself. Whilst the latter terms connote a lesser degree of scrutiny than 'correctness', they are nonetheless predicated on an assessment of the merits of the decision, which falls outside the scope of the Terms of Reference in accordance with the Secretary of State's letter. The Panel is, it is submitted, entitled to consider whether the ODPP properly informed itself of all relevant factors before reaching a decision of this nature, and in assessing that the Panel will necessarily apply a due diligence standard. This is, however, quite distinct from any assessment of whether the decision itself was reasonable/rational.

This distinction was recognised by the Chairman during the evidence of the Director in relation to the Andrea McKee issue, where the Chairman confirmed that it is not for the Panel to reach a view on the merits, although it is entitled to consider whether, as a matter of due diligence, the ODPP was fully equipped to make the decision (18.9.09, Day 66, p111).

Subsidiary prosecutorial decisions

12. During the evidence stage, two particular subsidiary or intermediate prosecutorial decisions of the ODPP were identified as being potentially subject to criticism: (1) the decision not to seek to adduce the witness statement of Tracey Clarke under Article 3 of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988 and (2) the decision not to disclose to Hobson's defence team the unedited statement of Tracey Clarke (or that portion of it which related to the allegations against Reserve Constable Atkinson).

13. Having heard all the evidence, Inquiry Counsel's Closing Submissions do not press for any adverse inference against the ODPP in relation to either of these decisions, for reasons which are addressed elsewhere. For completeness, however, the PPS wishes to set out its understanding of how the Terms of Reference apply to these decisions:

a. The PPS accepts that the Terms of Reference are wide enough to encompass any alleged failure to advise or direct further investigations necessary to reach an informed decision as to whether Tracey Clarke's statement could be adduced under Article 3. The PPS does not however accept that the Terms of Reference permit any determination of the merits of the decision not to invoke Article 3 (whether on reasonableness/rationality grounds or otherwise).

b. The PPS does not accept that disclosure decisions made within the Hobson prosecution fall within the Terms of Reference. The PPS does not accept that any alleged failure to discharge the Prosecution's duty of disclosure to Hobson can be said to have "shaped" the investigation into Robert Hamill's death in the sense that in consequence of this decision, further or other investigative steps would or should have been taken.

3 These submissions will approach the evidence in two parts, and pose questions under each:

3.1 Firstly, did the ODPP act with due diligence in relation to those charged with murder

3.2 Secondly, did it act with due diligence in relation to Res Con Robert Atkinson

We have concluded that the DPP's strategy in relation to prosecutions arising out of the Hamill case was fatally flawed. First, he decided to prosecute before he had received all relevant papers, including the complaint file (4.31 – 4.33). Secondly, when Timothy Jameson and Tracey Clarke resiled from their statements, he did not do enough to ensure that there were no other lines of enquiry available that could have secured a conviction, particularly in Allister Hanvey's and Stacey Bridgett's cases. Thirdly, he divorced the Atkinson complaint from the murder trial, and used Atkinson as a witness against Hobson knowing him to be tainted. Fourthly, he applied different credibility standards to RC Atkinson and Andrea McKee. Fifthly, he divorced the case against the McKees from that against the Atkinsons and Kenneth Hanvey. Sixthly, he dropped the case against the Atkinsons and Kenneth Hanvey without fully considering Andrea McKee's reliability and her reasons for failing to appear at the committal hearing. Lastly, he did not prosecute Thomas Hanvey or Stacey Bridgett for attempting to pervert the course of justice. If the Panel agrees with those conclusions, then they will be bound to find a lack of due diligence. We are conscious that time constraints have prevented us from developing the arguments to support these contentions as fully as we would have liked in our comments on this module, but we believe that consideration of our comments on all 18 modules, taken as a whole, will bear them out.

Those Charged

4 Generally

4.1 12/5/97 A meeting was held with Mr Roy Junkin (Deputy Director ODPP), DCS Maynard McBurney and Superintendent [redacted] at which they discussed the incident, the cause of death and the allegation of inactivity at the scene. (31613)

4.2 13/5/97 The ODPP issued a direction to the RUC for Professor Jack Crane to establish his views and findings on cause of death. (913 & 927)

4.3 13/5/97 16.00 A consultation took place with Raymond Kitson and Mr W Junkin of the ODPP, DCS Maynard McBurney, DCI P39 and DS [redacted] to discuss the medical evidence. The preliminary indication was that cause of death was a head injury. However, Professor Crane had spoken informally to DI Michael Irwin and indicated that septicaemia was a possible cause. The case against the defendants rested on the evidence of two witnesses, Tracey Clarke and Timothy Jameson, who were willing and able to give evidence. There had been no attempt at intimidation at this stage but police noted there was a strong possibility of intimidation, therefore the witnesses' names would not be disclosed in their statements. The role of Res Con Atkinson was discussed and it was noted that further investigation was required. (19069 & 31603)

4.4 15/5/97 DCS Maynard McBurney and DI Michael Irwin together attended Raymond Kitson of the ODPP to brief him in relation to their visit to Professor Jack Crane, following the ODPP direction of 13th May 1997. They reported that Professor Crane stood by his initial finding that the cause of death was a head injury. However, that in itself should not have caused the death. Other contributory factors such as alcohol, the position of the deceased and oxygen starvation were all likely to be present. They reported that further tests were to be carried out.

4.5 18/7/97 [redacted], of the Attorney General's office, wrote to the Director, enclosing a copy of the letter she sent to Richard Monteith giving reasons why the Attorney General had refused to issue a certificate descheduling the offences of Forbes, Robinson, Hanvey & Hobson. (18124)

4.6 22/7/97 DI Michael Irwin reported to DCI P39 at J Division on the matter of Tracey Clarke (Witness A) and Timothy Jameson (Witness B). He noted that Tracey Clarke was the ex girlfriend of Allister Hanvey. She lived in a predominantly protestant area which had a Loyalist Volunteer Force (LVF) following and due to ongoing pressure she periodically resided with relatives. Tracey Clarke alleged that due to the incident she had had to terminate two temporary employment posts, both in the Portadown area. She would have known the persons named, through her association with the 'Banbridge scene', her relationship with Allister Hanvey and through her girlfriends. Due to Tracey Clarke's allegations about a serving Police Officer, namely Res Con Robert Atkinson, who had many contacts within the Portadown Station, but who now served in Craigavon RUC Station, it was felt appropriate to refrain from identifying Tracey Clarke as a witness at this stage.

4.7 In addition, a separate ODPP file was being submitted which would include this allegation. The report recognized the junction in Portadown as an area of sectarian conflict and noted that the vast majority of Catholic witnesses had declined to cooperate. DI Irwin noted they might be unwilling to give evidence in the face of pressure to retract.

4.8 DI Irwin recommended an early consultation with Tracey Clarke, Timothy Jameson and with Colin Prunty. He noted that Timothy Jameson saw 'Fonzy', (who is now known to be Andrew Allen,) kick Robert Hamill in the face. Timothy Jameson had declined an offer to attend an ID parade to identify Allen.

4.9 The report said that DNA samples had been taken from Dean Forbes, Stacey Bridgett, Rory Robinson and Kyle Woods (not Allister Hanvey, Marc Hobson, Wayne Lunt or Andrew Allen). The report cited the reasons for not pursuing Andrew Allen as being that (1) there was a vague description of him; (2) there was a nickname discrepancy; (3) Witness B had declined an offer to attend an ID parade. The report noted an oral indication from Lawrence Marshall, FSANI, that a blood stain on Robert Hamill's clothing had come from Stacey Bridgett. The report recommended the charge of murder to be proceeded with as charged: Dean Forbes, Stacey Bridgett, Allister Hanvey, Wayne Lunt, Rory

Robinson and Hobson but recommended no prosecution of Mr Woods or Mr Allen.

4.10 It was also reported that Timothy Jameson came from Portadown and through his association with the 'Banbridge scene' would have had a good knowledge of the individuals involved. His identity was withheld, as with Tracey Clarke, to protect them both from intimidation which to no doubt they would be subjected in the pursuing months. Due to this fact Timothy Jameson was reluctant to personally identify 'Fonzy', namely William Andrew Allen. This report was submitted for the information of the ODPP via Detective Superintendent, Crime Branch. (6080 & 15292)

4.11 30/7/97 DCI P39 and Deputy Sub-Divisional Commander [redacted] read and endorsed DI Michael Irwin's ODPP report of 22 July 1997. DCI P39 noted, "the non co-operation of some witnesses and the Hamill family's solicitor has resulted in all possible evidence not being made available. The evidence of witnesses A and B is crucial, however, I refer you to the separate confidential report, submitted. I strongly support the recommendation that an early consultation be held with these witnesses. The medical and post mortem evidence, not yet to hand, will be salient in this case. Considering all the evidence to hand, I agree with Detective Inspector Michael Irwin's recommendation." (6135). Commander [redacted] noted "the facts are as comprehensively outlined by Detective Inspector Irwin. A consultation as suggested would be very beneficial. I recommend prosecution as outlined by Detective Inspector Irwin on page 48 of his report." (6136)

4.12 30/7/97 Mr Raymond Kitson made a note to the Legal Registrar to review the issues in relation to certification when the full police investigation file was received. (18118)

4.13 1/8/97 [redacted], solicitor, wrote to the ODPP requesting early sight of forensic and post-mortem reports. In manuscript at the bottom of letter a draft reply was noted that the file had not reached the ODPP offices. (28477)

4.14 5/8/97 The Director requested that before any final directions were issued in R v Hanvey, Lunt etc. the file was to be drawn to his attention. Also, when consideration was given to the case and any associated complaint, the directing Officer should refer to the case of R v Dytham (1979). (18122)

4.15 6/8/97 [redacted], Attorney General's office, wrote to Sir Alasdair Fraser enclosing a copy of her letter to Richard Monteith in relation to certification of the offence. (18112)

4.16 10/8/97 [redacted], solicitor, wrote to the ODPP requesting early sight of forensic and post-mortem reports. In manuscript at the bottom of letter a draft reply is noted that the file has not reached the ODPP offices.

4.17 12/8/97 ODPP Interim Direction Part I was issued. It was noted that forensic evidence (body fluids and physical methods) and the post-mortem were still outstanding. The direction was that no prosecution decision was to be made prior to receipt. It was noted that reference had been made by both the

investigating officer and DCI P39 to a separate report in a sealed envelope reference Witnesses A and B, and that this did not appear to have been forwarded with the original (or copies of the) police file. It was directed that this report should now be forwarded under appropriate classification, if necessary.(18106)

4.18 12/8/97 Mr Raymond Kitson wrote to Mr Monteith stating that the full police file had now been received and that post-mortem, medical and forensic reports were not yet available. Mr Kitson said he had issued a direction to police seeking expedition of all outstanding reports 18114

4.19 13/8/97 A Fax message sent by Raymond Kitson to DI Irwin. The Interim direction of 12/8/97 was to be attended to as matter of urgency. (18110)

4.20 18/8/97 Mr Monteith wrote to Mr Raymond Kitson expressing his disappointment that the crime file lacked the post-mortem, medical and forensic reports. (18105)

4.21 20/8/97 Mr Raymond Kitson wrote to Mr Monteith noting his disappointment that the crime file lacked the post-mortem, medical and forensic reports and promising to write to him when they become available. (18104)

4.22 27/8/97 [redacted] wrote to Mr Raymond Kitson expressing his concern about the absence of the forensic and pathology reports. (18103)

4.23 15/9/97 Mr Raymond Kitson wrote to [redacted] noting his concern that the crime file lacked the post-mortem medical and forensic reports and promising to write to him when they became available. (18101)

4.24 25/9/97 Mr Monteith wrote to Mr Raymond Kitson expressing considerable disappointment that no progress had been made and requesting an early timescale for receipt of the post mortem and other forensic reports. (18099)

4.25 7/10/97 Mr Raymond Kitson wrote to Mr Monteith noting his request for an early timescale for receipt of the post mortem and other forensic reports. He said that the need for expedition had been made known and he had made enquiries with the agencies, but could give no definite date for the reports. (18098)

4.26 14/10/97 A Further Interim Direction Part I was issued by Mr Roger Davison of the ODPP in relation to the murder prosecution. “I refer to Interim Direction dated 12 August 1997 which has not yet been answered. A final direction in this case will pend receipt of the matters referred to therein and will also pend the outcome of consultations to be held between Senior Counsel and the following witnesses: 1. Witness A; 2. Witness B; 3. Colin Prunty; 4. Jonathan Wright. Detective Superintendent [redacted] is requested to attend these consultations which are designed to assess the willingness and credibility of these witnesses.” (18092)

4.27 17/10/97 15.00 A meeting was held with Mr Roger Davison, ODPP, Gordon Kerr QC, Jonathan Wright, DS Robert Cooke and DS Dereck Bradley. In his note of the consultation, Mr Roger Davison recorded that Jonathan Wright would be a credible witness who did not indicate any unwillingness to give evidence. (17591)

4.28 17/10/97 15.30 A meeting was held with Mr Roger Davison, ODPP, Gordon Kerr QC, DS Robert Cooke, DS Dereck Bradley, DC John McAteer, Tracey Clarke, Tracey Clarke's parents, [redacted] and Mr Jim Murray. Mr Roger Davison recorded that Tracey Clarke was able to record the events of the night in accordance with her statement without having had an opportunity to refresh her memory. He considered that she was reasonably articulate and seemed to be telling the truth. If she were to give evidence he considered that she would come across as very truthful. Tracey Clarke expressed that she would rather die than give evidence 17591

4.29 21/10/97 A file note was written asking the Director to establish what response, if any, had been received from the Pathologist. (31870)

4.30 23/10/97 A note was written for Mr Raymond Kitson by a court official on behalf of the Resident Magistrate expressing concern about the lack of the pathologist's report. (31871)

4.31 24/10/97 Mr Roger Davison of the ODPP wrote to Mr Raymond Kitson of the ODPP regarding the consultation with Tracey Clarke and Timothy Jameson. He said that subject to Counsel's opinion and the other evidence arising, a direction of no prosecution be issued in relation to Dean Forbes and Rory Robinson. (18081) (NB: Raymond Kitson spoke to Gordon Kerr QC on 27 October 1997 before issuing this direction)

4.32 27/10/97 Mr Raymond Kitson of the ODPP telephoned Gordon Kerr QC for an update and some advice. (18342)

4.33 27/10/97 Mr Raymond Kitson wrote to the Resident Magistrate in relation to the delays of the completion of the post mortem report in R v Lunt & others, saying it should be completed shortly. (31863)

4.34 28/10/97 A note for the file was made by Mr Raymond Kitson. He noted that the file had been referred to him by Mr Roger Davison on 24 October 1997. He recorded that, in summary the position was that witness A would not give evidence. Witness B claimed that he could not recollect anything. He was, in Mr Roger Davison's view, lying. In Mr Roger Davison's view, without the evidence of Witness A and Witness B, Dean Forbes, Allister Hanvey and Rory Robinson would not be prosecuted. Mr Raymond Kitson decided to take conduct of the file from that point thereafter. He referred to his telephone call with Gordon Kerr QC on 27 October 1997 who said he had not completed his Advices but agreed essentially with Mr Roger Davison. Gordon Kerr QC did believe that Tracey Clarke could give credible evidence. Mr Raymond Kitson and Gordon Kerr QC then discussed whether she should be compelled to give evidence and Gordon Kerr QC agreed that this was a possibility but it was left

with the ODPP to consider. In the note, Mr Raymond Kitson went on to record that he had telephoned DI Michael Irwin after having spoken to Gordon Kerr. He raised the issue of compelling Tracey Clarke to give evidence. It was DI Michael Irwin's view that she would not give evidence in any event. DI Michael Irwin wished the ODPP to consider the forensic evidence linking Stacey Bridgett. (18342)

4.35 28/10/97 Mr Roger Davison telephoned DI Michael Irwin and asked whether he had he considered the matter overnight and wondered what were his views. DI Michael Irwin informed Mr Raymond Kitson that he had spoken to DCI P39 who had had previous dealings with the family of Witness A and who was closest to Witness A. It was both DCI P39's opinion, and the view of DI Michael Irwin, that there was no reasonable prospect, of Witness A giving evidence in court no matter what sanction were applied to Witness A. (18345)

4.36 28/10/97 It is recorded that Mr Raymond Kitson had also spoken to Detective Superintendent Robert Cooke who agreed that there was no reasonable prospect of Witness A giving evidence in court. In light of this, Mr Raymond Kitson decided to issue a direction of no prosecution against Dean Forbes, Allister Hanvey and Rory Robinson. A decision on Wayne Lunt had to await the consultation with Colin Prunty. A decision on Mark Hobson would have to await the pathologist's report. A decision on Stacey Bridgett had to await Counsel's advice but Mr Raymond Kitson's view was that the forensic evidence was not sufficient to support proceedings against Stacey Bridgett (18346).

4.37 29/10/97 The ODPP issued a Direction Part 1 which stated that in the light of what had occurred at the consultation with Tracey Clarke and Timothy Jameson, evidence from these witnesses would not now be available for any prosecution. In regard to Tracey Clarke, the question of her being a compellable witness was considered. Investigating police views were that no matter what steps were taken to summons her, she would not give evidence, no matter the sanction. The Chief Constable's office was also of that view. In the absence of evidence from Tracey Clarke and Timothy Jameson there was no reasonable prospect of a conviction against Dean Forbes, Allister Hanvey, and Rory Robinson. As for Wayne Lunt, direction would pend consultation with Colin Prunty and Senior Counsel. A direction for Marc Hobson and Stacey Bridgett would pend Senior Counsel's Advices but the final decision might also have to await consideration of the post-mortem report. (10620)

4.38 30/10/97 [redacted] attended Lisburn Magistrates' court, before the Resident Magistrate, Mr. [redacted]. An application was made to bring forward the cases of Forbes, Hanvey and Robinson, for the purposes of withdrawal. The application was granted. (31856)

4.39 30/10/97 The Clerk to the Court wrote to Mr Raymond Kitson asking on behalf of Resident Magistrate to learn of the ongoing activity in RUC v Lunt and others. (18075)

4.40 31/10/97 The charges were withdrawn against Allister Hanvey, Dean Forbes and Rory Robinson. They were released from custody. (31856)

4.41 3/11/97 The ODPP received Lawrence Marshall's report (see 24 October 1997) on items of clothing attributed to Robert Hamill. Robert Hamill's black leather jacket had extensive blood staining on the back with blood stains on the back right sleeve, right front and side. His jeans were bloodstained at the bottom of both legs, with staining more heavily on the left and with light stains on the seat. On the white shirt there were bloodstains on the collar and over the right shoulder at the back. It showed that unsuccessful DNA testing had been carried out on Robert Hamill's jacket, seat of his trousers, right shoe and the right cuff of Maureen McCoy's jacket. Successful tests showed Stacey Bridgett's blood on his own clothes and the right leg of Robert Hamill's jeans, blood from unknown A on Robert Hamill's clothes and on Maureen McCoy's jacket collar, and blood from an unknown person B on D's top. (17797)

4.42 4/11/97 A file note was made by Mr Raymond Kitson after new information had come into the ODPP's possession regarding Colin Prunty's identification of a defendant. Mr Raymond Kitson noted that a further consultation was required. This was arranged (at Portadown RUC Station). No decision could be taken until this consultation had taken place, information arising from that consultation had been considered and counsel's Advices obtained. In relation to Rory Robinson and Stacey Bridgett, it was recorded that Counsel's advices had not been yet received. There was a deferral pending the consultation with the witness in relation to Wayne Lunt above. (18032)

4.43 12/11/97 The post mortem report was received by the ODPP. (18035)

4.44 13/11/97 The ODPP received the opinion of Gordon Kerr QC which recorded the absence of a pathologist report and that Jonathan Wright was a reliable witness. Gordon Kerr QC formed the view that Tracey Clarke was entirely credible but possibly a reluctant witness. Timothy Jameson had attended with his father and said that he had been too drunk to recall anything and the statement which said he was not drunk at the time was a lie at the suggestion of a police officer. Gordon Kerr QC formed the view that this position was at least in part induced by fear and he was not a reliable witness. He also advised that at the first consultation, Colin Prunty had been an impressive factual witness. Gordon Kerr QC analysed the evidence against Dean Forbes, Stacey Bridgett, Allister Hanvey, Marc Hobson, Wayne Lunt, Rory Robinson, and advised that while the evidence against Dean Forbes was weak, every effort should be made to identify witnesses who might confirm the evidence of Colin Prunty. The case against Bridgett was difficult and required further information as to the blood staining. Following the retraction of statements by Tracey Clarke and Timothy Jameson, there was no longer a reasonable prospect of convicting Allister Hanvey.

4.45 As to Marc Hobson, Gordon Kerr QC advised clarification of Constable Alan Neill's evidence and that there might be a range of possible charges from murder, GBH and affray. He also concluded no reasonable prospect of convicting Wayne Lunt of murder or affray. For Rory Robinson, he found no

evidence of direct violence but at its height a charge of affray might be justified. (17633)

4.46 17/11/97 A file note was made by Mr Roger Davison, ODPP, that he had discussed the evidence of Stacey Bridgett's blood on Robert Hamill's clothes (on the right leg of his jeans) with Mr Lawrence Marshall, FSANI. One small spot of blood the size of a penny coin had been found. The blood on the left trouser leg was smeared and did not come from Stacey Bridgett. Mr Lawrence Marshall said the fact that the spot was not an elongated shape meant that there was nothing to indicate what direction the blood came from and he was reluctant to offer any interpretation as to how the blood got there. However, he said it was consistent with Robert Hamill lying on the ground and a drop of Stacey Bridgett's blood falling as he stood over him. A meeting to discuss this was arranged with Gordon Kerr QC for the next day. (18040)

4.47 18/11/97 Mr Roger Davison, Mr Raymond Kitson and Gordon Kerr QC met to discuss the case against Stacey Bridgett and Wayne Lunt. Forensic evidence in relation to Stacey Bridgett was discussed and it was indicated that Mr Roger Davison had spoken to Mr Lawrence Marshall. Gordon Kerr QC advised that this evidence was insufficient as all it proved was that Stacey Bridgett had been close enough to Robert Hamill to drip blood on him, but there was no evidence as to what he did. Further, the lie during interview, that he was not close to Robert Hamill, was not sufficient to incriminate him. Gordon Kerr QC advised that there was no reasonable prospect of convicting either.

4.48 Messrs Roger Davison, Raymond Kitson and Gordon Kerr QC considered the new Colin Prunty evidence identifying Dean Forbes and the pathologist's report. In relation to Marc Hobson, Gordon Kerr QC advised awaiting the pathologist's report and then he would advise on charge. The ODPP directed that charges be withdrawn against Wayne Lunt and Stacey Bridgett because, as a result of Colin Prunty's failure to identify Wayne Lunt, Colin Prunty's evidence was not reliable and further, no Officer had seen Wayne Lunt kicking at Robert Hamill on the ground.

4.49 As for Stacey Bridgett, the spot of blood proved no more than he had been close enough at some stage for blood to drop on Robert Hamill. At interview, Stacey Bridgett denied being near Robert Hamill however, this denial taken with the forensic evidence, was not sufficient to provide a reasonable prospect of his conviction for an offence relating to the death. A further direction in respect of Hamill [sic – Hobson] would pend clarification of whether Con Alan Neill saw Marc Hobson kick or attempt to kick at Robert Hamill. A further statement should be taken from Constable Alan Neill. (18041)

4.50 9/12/97 Mr Raymond Kitson ODPP wrote to the Director in relation to the letter from the Secretary of State. Mr Raymond Kitson noted that the police investigation file had been received on 7 August 1997 by the ODPP. The file reported eight persons, six of whom had been charged with murder, the other two had not been regarded as relevant as there was insufficient evidence to charge them with murder. Upon receipt of the file it had been noted that the

post-mortem report was not yet available neither was the forensic report. Mr Raymond Kitson stated that at the beginning of October 1997, under pressure from the remand Court, it had been decided to proceed with consideration of the file in the absence of the post-mortem and forensic reports. This report indicated that on 10/10/97, Roger Davison called DI Michael Irwin (the investigating officer in the case) who had said that since the incident in Drumcree, the attitude of the Protestant members of the community had hardened and it could not be guaranteed that the witnesses would give evidence. The result of consultations was that Tracey Clarke and Timothy Jameson could not be relied on to give evidence.

4.51 It was then reported that Senior Counsel had advised that without that evidence there was no reasonable prospect of convicting Allister Hanvey, Dean Forbes or Rory Robinson of any offence. The position in respect of Marc Hobson was still being considered in the light of the post-mortem report and any further evidence from Constable Neill. It stated that a further direction in respect of this would pend Crown Counsel's clarification of whether the mis-identification of Dean Forbes by Colin Prunty had been dealt with. Further enquiries were being made in respect of Dean Forbes given that Colin Prunty had been adamant that Dean Forbes had been detained in the Land Rover.

4.52 In respect to the five persons released, regard had been given to whether they were guilty of public order offences but, as they had spent nearly six months on remand, prosecution in the magistrates' court for offences which carried a maximum sentence of six months, was inappropriate. (18335)

4.53 10/12/97 A report was sent from the ODPP to the Attorney General's office which recited the facts and noted that there was no pathologist report, forensic report or medical report and that a crucial witness (Colin Prunty) could only be contacted through [redacted] who had not responded to the police. The report also contains a discussion about prosecution of certain suspects for public order offences. (17655)

4.54 16/12/97 The Attorney General wrote to Secretary of State to say that he was satisfied that all decisions relating to the prosecution had been carefully and properly taken. (39309)

4.55 22/12/97 A further opinion of Gordon Kerr QC was received by the ODPP in which he commented that the cause of death described in the pathologist report meant that all participants in the kicking were likely medically to have contributed to Robert Hamill's death. Further, Con Alan Neill had made a further statement clarifying that he had seen Marc Hobson kick at Robert Hamill in the head or shoulders area but had not seen whether the kick had made contact. The advice was to prosecute Marc Hobson for murder. (17631)

4.56 23/12/97 The Director wrote to Mr Kevin McGinty at the Attorney General's Office, to inform him that written Advices of senior counsel had been received in respect of Marc Hobson. Mr Kerr had advised that there was sufficient

evidence to afford a reasonable prospect of obtaining a conviction of Marc Hobson for the murder of Robert Hamill. (18199)

4.57 7/1/98 The Director wrote to Mr Raymond Kitson stating that he had undertaken to continue to monitor progress both in that case and in any developments resulting from the investigation being supervised by the ICPC. (18176)

4.58 14/1/98 The ODPP recommended that the application for a certificate under the Northern Ireland (Emergency Provisions) Act 1996 to deschedule the offence be refused in R v Hobson. (P18268)

4.59 18/2/98 The Director wrote to Mr Raymond Kitson noting that a preliminary hearing was listed to be heard at Craigavon Magistrates Court on Friday 29/2 at 14.00, and requesting to be immediately informed as to the outcome. (18169)

4.60 23/2/98 The Director wrote to Mr Raymond Kitson noting that the Preliminary Enquiry in the Hobson case had been adjourned until 13 March. He requested that he be informed IN ADVANCE [sic] when a date was fixed for committal and he wished to be assured that a mixed PI/PE would be conducted by experienced counsel. (18168)

4.61 18/3/98 [redacted], solicitor, wrote to the Office of the ODPP in relation to the forthcoming hearing of R v Hobson. He required oral evidence from Jonathan Wright, Con Alan Neill, Res Con Robert Atkinson, Edward Honeyford, [redacted]. He also requested that Res Con Denise Cornett and Reserve Con P40 give evidence. He sought disclosure of any materials as related to complaints made by the Hamill family against Officers Con Alan Neill, Res Con Denise Cornett, Res Con P40 and Res Con Robert Atkinson. (28226)

4.62 On 31/3/98 Mr Roger Davison replied to say that he was currently preparing a file of disclosure in relation to the C&D complaints which should follow in a few days. (18148)

4.63 On 12 August 1998 Mr Monteith confirmed that substantial disclosure had been received and requested full and complete disclosure. (p31541)

4.64 On 17 August 1998, [redacted] wrote to [redacted], stating that there was a substantial amount of unused material on the disclosure schedule and asking him to inspect those materials to confirm that they did not relate to the matters raised in his letter of 12 August 1998. (p31540)

4.65 On 17 August 1998, Mr Burnside wrote to DI Irwin, enclosing the Richard Monteith letter, stating that if there were any documents which fell into the specific categories he described, the Police should draw them to his attention at any disclosure inspection. Once inspection had taken place, DI Irwin had requested to make contact to discuss documents on the Sensitive Schedule. (p31539)

4.66 On 20 August 1998, [redacted] wrote to the ODPP stating that he had checked the materials already supplied to him to ensure that the matters specifically referred to in his letter of 12 August 1998 had already been supplied. (P31538)

4.67 On 15 September 1998, [redacted] wrote to the ODPP confirming that he had had a lengthy meeting with DS Richard Bradley and stating that he had yet to receive the two witness statements.

4.68 23/9/98 Mr Monteith wrote to the ODPP requesting disclosure of maps and baton reports and asking for confirmation of the ODPP's decision concerning whether any police officer involved particularly Neill, Atkinson, P40 & Cornett were to be prosecuted for any offence, including criminal neglect of duty, assisting offenders and withholding information about an arrestable offence. He noted that they had been interviewed under caution in 09/97, and requested prompt confirmation of the decision as this had a bearing on his client, Marc Hobson. (18277)

4.69 On 2/10/98 Mr Monteith wrote noting that his requests for disclosure had not been met. (31527)

4.70 On 9/10/98, Mr Burnside for the Assistant Director replied confirming that witnesses A & B had made statements identifying a number of people allegedly involved in the incident. It was stated that parts of statements relevant to Monteith's clients had been put to him at interview. Relevant parts had therefore been disclosed. Remaining parts were considered not relevant to an issue at the forthcoming trial and therefore no duty attached. (31526)

4.71 On 15 October 1998 [redacted] replied that he did not accept that the defence were entitled to copies of the original statements of A and B. (31623)

4.72 On 22/10/98 Mr Burnside stated that the Crown's position on the remaining disclosure remained the same. (31522)

4.73 On 28 October 1998 [redacted] stated that he considered that the defence were entitled to the entirety of both statements. The Crown should disclose information which would not be part of their case and might even contradict their case. He found incredible the claim of the Crown that the statements of two people who had provided the sole evidence to remand five persons in custody were not relevant to a matter in issue in the forthcoming trial. (31405)

4.74 On 3 November 1998 Mr Burnside replied that the Crown's position remained the same. The duty of disclosure extended to documents relevant to an issue or possible issue in the trial. (31504)

4.75 On 21/12/98 Mr Monteith wrote again asking for disclosure of the two statements. (31479)

4.76 On 29/12/98 Mr Burnside wrote indicating that he was consulting with senior crown counsel concerning the two witness statements. (31470)

4.77 On 4/1/99 Mr Burnside wrote to Mr Monteith enclosing edited copies of the witness statements of A & B. (31469)

4.78 25/3/98 A letter was sent from Mr Raymond Kitson of the ODPP to British Irish Rights Watch in relation to the murder prosecution. The letter recorded that in regard to the five persons who were charged with murder, the evidence as against each individual, had been carefully considered. The letter stated that the Advices of senior counsel had been obtained and number of consultations taken place. It was concluded that, in respect of these persons, the evidence available was insufficient to provide a reasonable prospect of obtaining a conviction for murder.

4.79 In regard to one other person who had been charged with murder, directions had been now issued from the Office of the ODPP to prosecute him for the offence of murder of Robert Hamill. The letter continued that the case remained, therefore, sub judice. It was anticipated that committal proceedings in this case would take place sometime in April or May. A further police investigation, supervised by the Independent Commission for Police Complaints, had been carried out and a police investigation file had been submitted to that Department. This further file was under consideration. In all these circumstances, Mr Raymond Kitson considered that it would not be appropriate to comment further. (41327)

4.80 22/4/98 The Committal proceedings took place in the matter of R v Hobson. The Resident Magistrate had found that there was a prima facie case against Marc Paul Hobson and returned him for trial. (41147)

4.81 28/5/98 A Direction of proofs of evidence was drafted by [redacted]. It recorded that it was essential that any further evidence directed should await prosecuting Counsel's early consultations with the Police. He noted that this case would be contested. [redacted] stated that Gordon Kerr QC had advised in this matter whilst he conducted the mixed Committal. He noted that this was a major case of great sensitivity and one which would inevitably attract much media attention. (18308)

4.82 29/5/98 Indictment R v Hobson. (18311)

4.83 14/7/98 Mr Raymond Kitson signed the certificate following the recommendation of the Director that a certificate descheduling the offence be refused for Marc Hobson. (28161)

4.84 22/1/99 A Further interim direction from the ODPP was made in the allegation of criminal conduct made by [redacted]. The direction stated that should any evidence which was material to that complaint arise at the trial, consideration would be given to it at that stage. To that end, the ODPP expressed that he would be grateful if DCS Maynard McBurney would forward a final report at the conclusion of the trial. (63507)

4.85 19/2/99 [redacted] briefed the Secretary of State regarding the Robert Hamill case. The current position of the Hobson trial was noted as was the file reporting on the alleged inaction of the police officers. The Secretary of State was told to note that the Chief Constable and the Attorney General were very sensitive to what they saw as any interference. (39453)

4.86 24/2/99 [redacted] wrote a note for the Attorney General briefing him on the Hobson trial, in particular that no action in respect of the complaints by the Hamill family would be taken against Res Con Atkinson, one of the prosecution's main witnesses, until the outcome of Hobson's trial. The ODPP(NI)'s Office had told him confidentially that it was unlikely that they would decide to prosecute any Officer but would keep an open mind to the evidence at the trial, and did not want the family to accuse them of pre-judging the issue. (40312)

4.87 20/5/99 A Fax was sent to the ODPP from the Attorney General's chambers. It stated that the trial of Hobson was addressing issues of murder and affray. It was not, nor could it be, an investigation into the activities of police, nor was it a Public Inquiry into the events of the death of Robert Hamill. (28150)

4.88 1/7/99 A Further Advice was received from Gordon Kerr QC in relation to the allegations against the police.

4.88.1 Advice 1 – 19334 (undated) The Advice stated that so far as the complaint against Res Con Atkinson alone was concerned, it arose from the statement of witness A and that her refusal to give evidence would be likely to extend to a prosecution of Res Con Atkinson. Gordon Kerr QC thought it remarkable that the McKees could recall the telephone calls, but whatever the truth of the calls, they did not themselves prove anything.

4.88.2 Advice 2 – 19343 (undated) The Advice dealt with the statements of Colin Hull and Vincent McNeice received from [redacted] and concluded that the statements conflicted with other evidence.

4.88.3 Advice 3 – 19345 (20 June 1999) The Advice covered the evidence given at the trial, which simply highlighted the confusion in the evidence.

4.88.4 Advice 4 – p19347 (1 July 1999) Gordon Kerr QC advised that there might well be legitimate criticism about the police reaction on the evening in question but he did not consider the standard required for prosecution to have been reached on the evidence

4.89 6/7/99 Barra McGrory wrote to Sir Alasdair Fraser about the evidence against Wayne Lunt which was discussed in the trial of Mr Hobson and asked the Director to confirm that he would reconsider his decision not to prosecute him. He expressed concern on behalf of the Hamill family in relation to the failure to pursue charges against Stacey Bridgett. (18253)

4.90 20/7/99 Sir Alasdair Fraser wrote to the Deputy Director attaching the letter from Barra McGrory dated 6/7/99 which asked for further information about the cases against Wayne Lunt and Stacey Bridgett. (18251)

4.91 13/8/99 A note was sent from Mr [redacted], ODPP to the Deputy Director where he indicated that he had reviewed the decision in relation to prosecution in the Hamill case. He noted that Tracey Clarke was Allister Hanvey's ex-girlfriend and lived on an estate where the LVF had a substantial following. She said that she did not want to give evidence because she still loved Allister Hanvey and because the other suspects were her friends. The note also referred to Timothy Jameson who said he was too drunk to remember. Once their evidence became unavailable there was no other evidence against Dean Forbes, Allister Hanvey or Rory Robinson. He discussed the evidence in relation to Wayne Lunt, who was additionally identified by Con A and Colin Prunty. Following Colin Prunty's statement that he believed it was Dean Forbes he saw in the Land Rover, [redacted] stated that there was clearly insufficient evidence to prosecute Wayne Lunt for the murder of Robert Hamill. He also set out the difficulties against Stacey Bridgett and agreed with the Advice of senior counsel that there was no reasonable prospect of conviction. He further agreed with the conclusion that there was no reasonable prospect of conviction for affray, although the decision was a fine one (18321).

4.92 24/8/99 A reply was sent from the Deputy Director of the ODPP to Mr. White ODPP in response to his letter of 13 August 1999. The letter indicated that all internal papers and the judgment of [redacted] LJ in the Marc Hobson trial had been considered. He concluded that the prosecution decisions were correct. (17606)

4.93 25/8/99 Mr. [redacted] of the ODPP wrote to [redacted] Solicitors, and summarized the prosecutorial decisions. His letter recorded that the decision not to prosecute Wayne Lunt had been issued to the Chief Constable on 19 November 1997 and had been reviewed. It set out the difficulties with the identification by Colin Prunty. (17601)

4.94 29/8/99 The ODPP issued a direction stating that prior to a final decision being taken, the written Advices of senior counsel had been obtained and considered. It is not considered that the evidence was sufficient to afford a reasonable prospect of convicting any police officer reported on the file of any offence. The ODPP therefore directed no prosecution. (8999)

4.95 22/6/00 Sir Ronnie Flanagan, Chief Constable, telephoned Sir Alasdair Fraser, ODPP, to ask for a point of contact. (18977)

4.96 26/6/00 A meeting was held at the ODPP offices with attendance by ICPC and DCS Maynard McBurney at which DCS Maynard McBurney said he had been briefed fully on the outcome of the actions he had taken in relation to the McKees. It was decided to commence reinvestigation into Res Con Atkinson by DCI K under DCS Maynard McBurney. This investigation would include

all issues in relation to the actions of Res Con Atkinson and the false alibi offered in his support. Mr Raymond Kitson noted that, at the time of the original complaint investigation, an allegation from Tracey Clarke had been that Res Con Atkinson had told a suspect to get rid of his clothes and kept the suspect informed of the murder investigation. The police had investigated the allegation and had found that there were two telephone calls: one at 08.37 on 27 April 1997 and a further telephone call on 2 May 1997. The witness statements had been recorded from Michael McKee, Andrea McKee and Eleanor Atkinson, Res Con Robert Atkinson's wife indicating that there was an innocent explanation for these calls.

4.97 Andrea McKee had made a statement on 20 June 2000 which said that part of the evidence which she had given in her original statement of 29 October 1997 was untrue. DCS Maynard McBurney explained to Mr Raymond Kitson the circumstances which had given rise to Andrea McKee making this statement of 20 June 2000. He said that during the course of assisting the Coroner in setting up an inquest into the death of Robert Hamill, he learnt that Andrea McKee had separated from her husband. He went to see the separated parties individually and Andrea McKee indicated that part of what she had said was untrue. DCS Maynard McBurney stated to Mr Raymond Kitson that he had decided to take a witness statement from Andrea McKee rather than a caution statement.

4.98 DCS Maynard McBurney discussed two issues with Raymond Kitson. Firstly, he queried whether he was right to have taken a witness statement. Secondly, he sought advice as to how to proceed with the investigation with respect to Michael McKee. Raymond Kitson noted that he had indicated to DCS Maynard McBurney that it was not for him to say whether it was right or wrong to take a witness statement from Andrea McKee but it did on the face of it appear that she had committed an offence of doing an act intended to pervert the course of justice. The matter would be reported to the Director and further consideration given to the issues which arose from the decision not to take a caution statement.

4.99 With regard to Michael McKee, it was noted that Mr Raymond Kitson had told DCS Maynard McBurney that it was not for him to advise the police at this stage that they should investigate the matter regarding Michael McKee as central to the conspiracy. The matter should be reported to the Director's office. There was no question of Mr Raymond Kitson being able to give Michael McKee or any of the others some sort of immunity from prosecution at this stage.

4.100 DCS Maynard McBurney indicated that further inquiries would take time and that Andrea McKee was in a different position to Michael McKee who should be interviewed under caution. [redacted] of the ICPC indicated concern over the amount of time indicated by DCS Maynard McBurney as being necessary for further inquiries but it was agreed by all in principle that it should be left for the police to make the further inquiries before any other decisions were made. (17625)

4.101 9/8/00 10.00 A Decision 11 part VI was made to liaise with the ODPP regarding the evidence of Andrea McKee and her minor role in the conspiracy. (32348 at 32365)

4.102 30/10/00 A meeting was held between the Attorney General, Sir Alasdair Fraser, Mr Kevin McGinty and another. The Director said that he had read the Langdon report which he had found to be excellent and the Attorney General agreed. The outstanding investigation was discussed. The Director said that the investigation into Res Con Atkinson gave rise to two areas of concern; firstly, the possibility of serious charges being laid against Res Con Atkinson him, and secondly the effect that such a prosecution would have on his evidence in support of the account given as to police behaviour on the night of the murder. (40246)

4.103 28/11/00 A meeting was arranged between Mr Raymond Kitson, ODPP, DCI K & Chris Mahaffey, PONI, to discuss the investigation. (2717)

4.104 5/12/00 A directional meeting with PONI and the RUC took place when the revised strategy for simultaneous arrest of all parties to the conspiracy, searches and covert surveillance was put forward by PONI and accepted by the police. DCS Maynard McBurney said that there was no specific intelligence about a clash. The decision was made to contact Raymond Kitson at the ODPP about Andrea McKee's position (he later attended the meeting). DCS Maynard McBurney told PONI that Res Con Robert Atkinson had not been suspended because he might have claimed compensation if there had not been sufficient evidence to prosecute or charge him. (2884)

4.105 16/2/01 A meeting took place between DCI K, DCS Colville Stewart and PONI. A decision was made to seek an ODPP direction about the issues surrounding the evidence of Andrea McKee and Tracey Clarke regarding the Res Con Atkinson conspiracy, noting that the finalization of the arrest strategy would be dependent on that direction. The report recorded that DCS [redacted] had commenced an investigation into the initial actions by the police. As soon as this element of the Res Con Atkinson investigation was finalized, DCS Colville Stewart's intention was to revisit and review the issues surrounding the murder, including the Timothy Jameson issues. (2923/ 2925-6)

4.106 19/2/01 Mr Raymond Kitson, ODPP replied to Chris Mahaffey, PONI's letter of 13/2/01 (14662). He stated that at the consultation with Timothy Jameson on 21/10/1997, Mr Jameson alleged he had been told to insert a lie by the police. He had told his solicitor the next day that the information contained in his statement was gleaned from gossip and talk around the town. Mr Kitson stated that it was perfectly clear to him that Mr Jameson's position was probably at least partially induced by fear. However, there was no evidence to support any Article 3 application even if were proper to consider one. The police view was that the father was a local businessman who may have felt his son giving evidence would be commercially disastrous. Mr Kitson concluded that Mr Jameson could not be considered a reliable witness on the papers. (14659)

4.107 22/2/01 PONI directed technical deployment at the Atkinson and Hanvey homes unless ODPP confirmed that it would vigorously pursue the prosecution on Res Con Robert Atkinson. (28004)

4.108 28/2/01 11.00 – 13.15 A meeting was held with Chris Mahaffey, PONI; Raymond Kitson, ODPP and DCS Colville Stewart. They considered (32308):

4.109 Using Tracy Clarke as a hostile witness; and

4.110 The legal implications of using Andrea McKee as a credible witness.

4.111 6/3/01 A meeting was held between PONI and the police, represented by DCS Colville Stewart and DCI K, after the meeting with the ODPP. Firstly, it was decided that all suspects in the Res Con Atkinson conspiracy would be arrested together. Secondly, it was decided that intrusive surveillance would be made at the time of the arrests to provide further evidence. Thirdly, it was decided that Andrea McKee would be re-interviewed at the time of the other arrests to determine her ability and willingness to give evidence. This was because if the intrusive surveillance were not successful, her evidence may be necessary for a conviction. (2927)

4.112 3/4/01 DCI K signed the operational order 'Clutch'. (21586)

4.113 4/4/01 A meeting was held between the ODPP and PONI regarding the evidence allegedly passed on to DI Michael Irwin and DCS Maynard McBurney about Timothy Jameson's involvement. The current position was that DI Michael Irwin had been interviewed under caution and DCS Maynard McBurney had been interviewed not under caution as he had retired. Both DI Michael Irwin and DCS Maynard McBurney said that they had no knowledge of any notes or written materials in conjunction with the information about Timothy Jameson which they received from Res Con McCaw and Res Con G. DC Edward Honeyford had interviewed Timothy Jameson to take the statement and DI Michael Irwin maintained that he had been there for part of it. Timothy Jameson's position was considered with regard to any admissions made by Timothy Jameson to the ODPP. DI Michael Irwin denied being present when Timothy Jameson retracted his evidence but this was inconsistent with the ODPP file note by Roger Davison. The main concern was how Timothy Jameson went from being a suspect to a witness. The ODPP was to decide whether to disclose the Advice of Gordon Kerr QC to PONI. (14612)

4.114 5/4/01 Mr Raymond Kitson of the ODPP wrote to DS Wenford McDowell and noted that there was no indication that Res Con Robert Atkinson or Michael McKee had played any role in Tracey Clarke's decision not to give evidence. He recorded that it was incorrect to say that she had retracted her evidence as at no stage had she indicated that her evidence was untrue, rather she had said that she was not prepared to give it. (18964)

4.115 12/6/01 The ODPP received the crime file. (20021)

4.116 15/8/01 A direction was produced, signed by the ODPP, to prosecute Andrea McKee and Michael McKee for doing an act with a tendency to pervert the course of justice. The direction cited the dates of their dishonest witness statements. (21849)

4.117 17/8/01 The RUC, following a direction from ODPP, sought proof of subscribers and telephone billing for Kenneth Hanvey and Res Con Atkinson. (3030)

4.118 21/8/01 Mr Raymond Kitson issued the directions for the committal proceedings in R v Andrea & Michael McKee. (34394)

4.119 26/11/01 Mr Monteith wrote to the ODPP requesting a decision in respect of the prosecution of his clients. (22093)

4.120 29/11/01 Mr Raymond Kitson wrote to DCS Colville Stewart in relation to the adjournment of the arraignment of the case against Andrea and Michael McKee. He also stated that the principle file in relation to the reporting of Res Con Atkinson had not yet been received by his office. (22899)

4.121 6/12/01 Res Con Atkinson's solicitor wrote to Mr Raymond Kitson advising him that he had received a letter from DCI K informing him that that file had been forwarded to the ODPP and requesting to know when the file had been received and when a direction would be issued. (22898)

4.122 10/12/01 Andrea McKee's solicitor wrote to ODPP asking for sight of the disclosure schedules. (22896)

4.123 19/12/01 Mr Raymond Kitson wrote to Sean Hagan telling him that the file in relation to the Atkinsons and others had been received from the police. He was unable to give an indication as to when a direction would issue. (22893)

4.124 19/12/01 Mr Raymond Kitson wrote to Arthur Downey, Andrea McKee's solicitors, confirming his junior counsel and asking whether Mr Raymonnd Kitson had requested disclosure schedules from the police. (22894)

4.125 12/12/01 Paul Downey, solicitor, served Andrea McKee's defence statement on the ODPP, stating that she had acted under duress. (34353)

4.126 3/1/02 Mr Raymond Kitson wrote to the law clerk in relation to disclosure for Andrea McKee. (22888)

4.127 8/1/02 Mr Raymond Kitson responded to Mr Monteith's letter of 26/11/01 apologising for the delay in replying. He stated that the crime file had been submitted by the police to the Director's office and that no decisions as to prosecution had been taken in the case. (20092)

4.128 9/1/02 Mr Monteith wrote to the ODPP to say that he had not received any reply to his letter of 26/11/01

4.129 10/1/02 Mr Monteith wrote to Michael Matthews asking him to confirm when the Police investigation file had been submitted to the department and asking whether there were guidelines as to the time during which a decision to prosecute should be taken. (20085)

4.130 31/1/02 A consultation on the case of R v McKee and McKee took place. Mr Carl Simpson QC, Mr Mike Matthews ODPP, Mr Raymond Kitson ODPP, DCS Colville Stewart, DCI K and DS H attended to discuss possible pleas to be entered by the McKees. They discussed the issue of deferring Andrea McKee's sentence until after she had given evidence against Res Con Robert Atkinson. Counsel advised that it was not appropriate to defer her sentence and the case should proceed in the normal way. (2875 & 1770)

4.131 5/2/02 A further meeting took place to decide whether sentence should be deferred for Andrea McKee. DCI K, DCS Colville Stewart and DS H were present. (1767)

4.132 11/2/02 DCS Colville Stewart wrote urging the ODPP to defer sentence on Andrea McKee. (28870)

4.133 4/3/02 Andrea McKee and Michael McKee pleaded guilty and were convicted of conspiracy to pervert the course of justice. (16206 & 16207)

4.134 5/3/02 Brendan Hagan wrote to Mr Raymond Kitson asking whether a direction was imminent. (20083)

4.135 14/3/02 Mr Raymond Kitson replied to Mr Monteith's letter of 6/3/02 confirming that a crime file in relation to Andrea and Michael McKee had been received by the ODPP on 12/6/01. On 19/12/01 a further crime file, in relation to two members of the Atkinson family and four members of the Hanvey family had been received. He said that Directions in the latter were still under consideration. (20000)

4.136 15/4/02 Mr Monteith wrote to Michael Matthews, ODPP, in response to Mr Raymond Kitson's letter of 14/3/02 querying the reason for the delay of six months by the police between the handing up the crime file relating to the McKees and that relating to the Hanveys and Atkinsons. (19999)

4.137 23/4/02 Mr Michael Matthews wrote to Mr Monteith explaining the delay of six months between the handing up the crime file of McKees and that of the Hanveys and Atkinsons. He stated that Richard Monteith's clients had been the subject of additional police enquiries and interviews which had not been completed until after June 2001, and that the file was of considerable complexity. (19998)

4.138 29/4/02 Mr Monteith wrote to Michael Matthews stating that the delay was inexcusable and asking when his clients could expect a direction. (19997)

4.139 8/5/02 Mr Michael Matthews wrote to Mr Monteith unable to give a definitive date but reassuring him that the matter was receiving urgent attention. (19996)

4.140 15/5/02 Brendan Hagan wrote to Mr Raymond Kitson asking whether a direction was imminent (20060)

4.141 16/5/02 Gerald Simpson QC was instructed by Mr Matthews, ODPP, to advise on the prosecution of the Atkinsons and the Hanveys. (20052)

4.142 22/5/02 Mr Michael Matthews, ODPP wrote to Brendan Hagan about his letter of 15/5/02. He said that the papers in the case had been passed to Senior Crown counsel for advice and would receive urgent attention although he could not predict when a direction would issue. (20059)

4.143 27/6/02 Brendan Hagan wrote to Mr Raymond Kitson asking for an update on when a direction would be issued. (20085)

4.144 30/8/02 Gerald Simpson QC, for the ODPP, gave an opinion in which he examined the corroborating evidence in the Res Con Robert Atkinson conspiracy case, including the evidence of Andrea and Michael McKee. He noted that Tracey Clarke had never denied the truth of her statement but was in a relationship with Allister Hanvey. (20044)

4.145 3/9/02 Brendan Hagan wrote to Mr Raymond Kitson asking for an update on when a direction would be issued. (20040)

4.146 8/9/02 Gerald Simpson QC wrote to Mr Mike Matthews ODPP about the prosecution of Res Con Atkinson. He said that he was not satisfied that the evidence was such as to provide a reasonable prospect of conviction in respect of the clothing worn by Allister Hanvey. He noted that the evidence was intrinsically weak. Gerald Simpson QC considered that a conviction was unlikely against Thomas Hanvey and Allister Hanvey notwithstanding the efforts of the investigation officers to prove the existence in Northern Ireland of the type of coat referred to. (20042))

4.147 11/9/02 MM [presumably Michael Matthews] made a note stating that he had made contact with DS H in relation to Mr Simpson's Advice. They had concluded that a consultation with Mr Simpson should be held in the week commencing 23/9/02. (20033)

4.148 25/9/02 Mr Mike Matthews sent a copy of Mr Simpson's direction of proofs to DS H. (20028)

4.149 30/9/02Mr Mike Matthews wrote to Brendan Hagan about his letter dated 3/9/02. He said that Senior Counsel's opinion had been received and was being considered. (20026)

4.150 11/10/02 Chris Mahaffey, PONI, wrote to DI Irwin in relation to the conduct of the RUC Investigation into the murder of Robert Hamill. He stated that the ODPP were still considering the crime file and he was surprised about the delay. He would carry out a full review of his own investigation. (27718)

4.151 17/10/02 DCI K issued a report for consideration by Mr. Justice Cory. The report referred to a direction to reinvestigate the allegations concerning Res Con Robert Atkinson that had been previously investigated in June 2000. It noted that PONI had supervised the reinvestigation into Res Con Atkinson, that Andrea McKee and Michael McKee had been convicted of conspiracy but that an ODPP direction was still awaited in relation to the arrest of the Atkinsons and Hanveys. (2981)

4.152 25/10/02 Brendan Hagan wrote to the ODPP requesting an update on his clients, the Atkinsons. (20020)

4.153 11/11/02 Mr Monteith wrote to Mr Raymond Kitson stressing the urgency of the case. (20018)

4.154 3/12/02 Mr Hagan wrote to the ODPP noting that he had not received an update on the Atkinsons and stating that the delay posed a breach of his client's human rights and that without explanation they could only conclude that it was not solely attributable to evidential or procedural difficulties, but to other factors. (20015)

4.155 5/12/02 Mr Ivor Morrison, Assistant Director of the ODPP advised Superintendent Karen Kennedy of his intention to prosecute Res Con Robert Atkinson and Eleanor Atkinson jointly on indictment for conspiracy to pervert by lying about the identity of the person making a phone call at 08.37 on 27 April 1997. Kenneth Hanvey was also to be prosecuted. It was recorded that it was not intended to prosecute any other person in connection with that investigation. (34161)

4.156 27/1/03 The crime file containing the report of DS Wenford McDowell was sent to the ODPP in relation to Timothy Jameson. It was noted that no recommendation could be made for prosecution until DI Michael Irwin and DCS Maynard McBurney were interviewed and Timothy Jameson's DNA was compared. (15868)

4.157 3/2/03 The Legal Registrar received Acting Detective Superintendent [redacted]'s recommendation of no prosecution of Timothy Jameson. He recognized that forensic results were still outstanding and they might change his recommendation but the case was built on the recollection of Res Con G that Timothy Jameson said he had put the boot in, which was not in itself sufficient. He also noted however that Timothy Jameson was a member of a well known Portadown family with strong links to loyalist paramilitaries. (19471)

4.158 28/3/03 An ODPP direction was given to prosecute Res Con Robert Atkinson and Eleanor Atkinson for conspiracy to pervert the course of justice and Kenneth Hanvey for doing an act which had a tendency to pervert the course of justice. (68319)

4.159 18/4/03 Mr Raymond Kitson of the ODPP directed that there be no prosecution of Timothy Jameson for any offence. (31715)

4.160 8/12/03 Mr Ivor Morrison wrote to Raymond Kitson about the letter from DCS Colville Stewart to the judge about sentencing Andrea McKee. (34074)

4.161 23/12/03 Mr Monteith wrote to Ivor Morrison, ODPP, in response to his letter of 17/12, disagreeing with him on his interpretation as to the mechanisms for disclosure. (34060)

4.162 9/1/04 DCI K, Miss Christine Smith BL, Mr Ivor Morrison and DS H met Andrea McKee to discuss her reasons for non attendance at court. Andrea McKee gave her account of phoning and visiting Pendine Park. (59862)

4.163 16/2/04 Mr Monteith wrote to the ODPP requesting any further relevant disclosures about the sickness or otherwise of Andrea McKee's child. He stated that he would be relying upon the very firm explanations given to him by the ODPP with regard to the alleged sickness of the child. (33883)

4.164 17/2/04 16.00 A meeting took place with Mr Ivor Morrison, DCI K, Gerald Simpson QC and Miss Christine Smith, BL. The reasons for Andrea McKee's non attendance at court were discussed. (33913)

4.165 25/2/04 Meetings took place with Ivor Morrison of the ODPP, DCI K, Gerry Simpson QC and Miss Christine Smith BL. (33909 at 33913)

4.166 26/2/04 A meeting was held between [redacted] ODPP, Mr Ivor Morrison ODPP, Gerry Simpson QC about Andrea McKee. (33979)

4.167 26/2/04 Mr Ivor Morrison of the ODPP called [redacted], solicitor for Kenneth Hanvey. He told him something about the enquiries into Andrea McKee's reason for non attendance and made a note of the call. (33974)

4.168 26/2/04 Following the meeting with Sir Alasdair Fraser ODPP, [redacted] and Gerald Simpson QC, Mr Ivor Morrison conferred with DCI K, DS H and DC J. He informed them that the Director had requested Mr Simpson to confer with Andrea McKee for the purposes of assessing her credibility. (33975)

4.169 27/2/04 R v Atkinson and others was mentioned. [redacted], counsel for Res Con Atkinson said that Andrea McKee's statements that her son had been seriously ill with testicular mumps were "simply not true", as the only proof presented so far was that the child had an ear infection. [redacted], said that "it was even worse …. [in that] Mr Morrison and Miss Smith had been told … a blatant and utter lie".

4.170 2/3/04 A consultation with Gerald Simpson QC was attended by DC Patricia Murphy, DC [redacted], Mr Ivor Morrison ODPP and Andrea McKee. Andrea McKee told Gerald Simpson QC that the absence of telephone records relating to her at Pendine Park surgery might be because she had used a mobile phone that she had since given to her niece. Gerald Simpson QC said that might account for a telephone call but not the fact that there was no record of Andrea McKee being at Pendine; that the Police had carried out investigations and that these would show that she had not been there. (33965)

4.171 15/3/04 Gerald Simpson QC gave an Opinion in which he concluded that Andrea McKee had concocted the story about taking her child to the surgery; that there was no shred of corroboration for her story and the effect of her maintaining it was to contaminate any evidence she might give and completely undermine her general credibility. (33915)

4.172 16/3/04 Ivor Morrison, ODPP, made a file note in which he stated that he had attended three consultations with Andrea McKee and in his view she had been untruthful. The Pendine Park issue provided a basis upon which the defence would attack her credibility which, without doubt, would be critically damaged and that there would no longer be a reasonable prospect of conviction. (33919)

4.173 16/3/04 The Director wrote to Mr Ivor Morrison stating that he needed, during the course of this week, to take decisions relating to the prosecutions of the police officers arising out of the death of Robert Hamill. (33942)

4.174 17/3/04 A Further Direction - Part 1 was issued, further to the direction issued on 1/4/03 to prosecute Res Con Robert and Eleanor Atkinson on indictment for an offence of conspiracy to pervert the course of justice. It stated that the reason Andrea McKee had given for her non attendance at the committal proceedings on 22/12 was such as to undermine her general credibility. Accordingly the Director had concluded that there was no longer a reasonable prospect of obtaining a conviction. (33903)

4.175 18/3/04 Mr Ivor Morrison (ODPP) as the case officer prepared a summary of events. (33909)

4.176 18/3/04 Sir Alasdair Fraser QC, Director, ODPP wrote to Mr Kevin McGinty informing the Attorney General that the ODPP was minded to offer no evidence in the prosecution of Res Con Atkinson and others in the light of the Opinion of Gerald Simpson QC of 15 March 2004. (33908)

4.177 18/3/04 (misdated 18/12/04) Mr Kevin McGinty wrote to the Attorney General, stating that it was clear that the reasons for Andrea McKee's non-attendance on 22/12/03 could not be explained. It was accepted that since she had pleaded guilty for her part in the conspiracy, one untruth did not mean a jury might not believe her. As she was an accomplice, the Attorney General was asked to consider decision by the Director that he could call Mrs McKee as a witness of truth in the context of the collapse of the Supergrass trials. Mr McGinty also stated that he would expect Mr Simpson QC to decline to appear if the case proceeded. The Attorney General might have concerns about dropping the case because of Mrs McKee's excuse but Mr McGinty considered the factors justified it. The Attorney General was warned his involvement in Hamill and Cory would be liable to be seen as an attempt to put off an Inquiry. Dropping the case would allow the Cory report on Hamill to be published and an Inquiry held sooner, assisting the Prime Minister to keep his Weston Park commitments and reduce criticism about the delay in making the Finucane Inquiry decision.

4.178 18/3/04 The Attorney General wrote to the Prime Minister's Chief of Staff explaining the ODPP's reasoning for withdrawing proceedings. (33878)

4.179 19/3/04 The cases against Res Con Robert Atkinson, Eleanor Atkinson and Kenneth Hanvey were withdrawn following the Advice from counsel that as Andrea McKee's reason for not attending the committal hearing could not be corroborated or confirmed, her credibility had been undermined to such an extent that it could not proceed. (33874)

4.180 22/3/04 A Further direction was made of no prosecution of Res Con Robert Atkinson, Eleanor Atkinson and Kenneth Hanvey for conspiracy to pervert the course of justice. (33891)

4.181 23/3/04 Mr Ivor Morrison, ODPP, wrote to Barra McGrory giving him an account of why the proceedings had been withdrawn. (33874)

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We are very surprised that the Attorney General was warned by the DPP that "his involvement in Hamill and Cory would be liable to be seen as an attempt to put off an Inquiry. Dropping the case would allow the Cory report on Hamill to be published and an Inquiry held sooner, assisting the Prime Minister to keep his Weston Park commitments and reduce criticism about the delay in making the Finucane Inquiry decision." (4.177) It seems that the DPP was proactively seeking approval for dropping the case against the Atkinsons and Kenneth Hanvey on purely political grounds, despite Sir Alasdair Frasers's avowal of total independence of the government (5.516).

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

See comments relating to the DPP in Section 8

Submissions by the Public Prosecution Service

Corrections:

§4.1 Mr Magill, not Mr Junkin, was Deputy Director as at 12 May 1997 and attended the meeting on that date.

§4.2 refers to the ODPP issuing a Direction on 13 May 1997. It is not correct to describe this as a *"DPP Direction"*. *"Direction"* is a term of art. As Mr Kitson explained in his evidence to the Inquiry, the use of the term by DCS McBurney is inappropriate (15.9.09, Day 63, pp35-6).

5 Witnesses:

Raymond White

5.1 Per 81255 "The SIO would be subject to legal advice from ODPP". It would be advice in the form of a consultation or questions of law relevant to the prospect of a successful conviction. This was done verbally or in the form of a letter (p101). He referred to a situation where information might come back from the ODPP after the submission of the police file. It would be rare but there would be consultations between the Director, (if it was a complicated case), Raymond White and the relevant senior investigating officers before the submission of the file (p103). It was not for the ODPP which enquiries and investigations the police should conduct. "There was a clear firewall between what you could approach the Director for and what [the police] had to handle for ourselves" (p104). "ODPP was extremely protective of the separation between ODPP's requirements and what the police had to do. The Director made it absolutely clear that it was not within [ODPP's] role to shape or direct police enquiries but he would be available for questions on the evidence necessary to establish elements of an offence" (p105). After the submission of a file, legal communications would take the form of an interim direction. (p106)

5.2 Per para 8 81661 "It was a flexible system. The whole objective was to make sure the information put before ODPP was the best that could be achieved…Suggested lines of investigation was a role that was shared between C2 department and ODPP" (p107). The responsibility of ensuring that best evidence is put to ODPP comes from C2 before the file is submitted then from ODPP through C2 (p109). C2 would be responsible for furnishing information to ODPP in response to an interim direction. (p111)

5.3 Per para 14 81633 "My job was also to accompany any officers to ODPP if they had been directed to hold a discussion with them on a controversial subject e.g. the quality of a witness". This would be towards the end of the ODPP's decision-making process (p111). The Director would express his dissatisfaction to Mr White if something had gone wrong in an investigation. This occurred in cases where there was a serious lapse of professionalism (p112). Quite often this would be regarding a failure to make a piece of intelligence available that should have been disclosed (p113). The same "firewall" was present in those meetings as well (p115). 31613 was an example of the exchange that would take place about the remand process. Once the charging process had started, there were clocks ticking about remand (p138). 927 was an example of discussion about further issues. There was nothing to stop that interchange taking place (p139). The firewall was pretty flexible (p140). 31603 shows the type of intermediate exchange where police involved the ODPP regarding the process of investigation as it was relative to the remand process (p141). It would be through Mr Raymond Kitson that remand processes were conducted (p142). He would not be surprised if it showed that the ODPP were aware of the Atkinson allegation on 12th May as DCS McBurney knew the ODPP staff on a very personal basis. There might

have been a relaxed discussion between them, in order for him to seek support for police progress. (p143)

Daniel Magill

Statement

5.4 Para 2: In 1997 he was the Deputy Director of the ODPP office. He had been in that post for five or six years and he had left the ODPP in September 1997. He had no recollection of being involved in the Hamill matter at all. He had been shown a file note (31613) Deputy Director headed paper following a meeting held on 12th May 1997. The note was signed on his behalf by his secretary. It was copied to Mr Junkin, who was the Senior Assistant Director at that time. According to the file note, he met with Superintendent Hooke and Superintendent McBurney. I had no recollection of this meeting whatsoever, having read the file note.

5.5 Para 8: If he had been told that the ICPC were supervising a complaint against a police officer at the scene, he imagined that he would have put that in the file note. Additionally, if he had been told that there was an allegation that a Reserve Constable had tipped off a suspect to disclose of his clothing, he could not imagine any circumstance in which he would not have included that in the file note. He would have considered these to be relevant matters and he would have included all relevant matters he had been told in the note.

Michael Matthews

Statement

5.6 Para 2: In 2001 he was in the Special Cases section dealing with cases that needed to be sent to a central unit due to their complexity, difficulty, sensitivity etc.

5.7 Para 4: He gave an Interim Direction on 16/1/02 on R v Atkinson following a consultation with DCI K & DC H. It was agreed that final directions should await conclusion of the related McKee criminal proceedings and a review of the evidence was available.

5.8 Para 6: As to whether the McKees, the Atkinsons and Mr Hanvey should have been put together on one indictment was a matter for Mr Kitson but he could see the sense of clearing the case against the McKees then dealing with the others. The issue of deferring the sentencing of Mrs McKee was raised but there was no such practice in Northern Ireland.

5.9 Para 7: Gerald Simpson QC advised on the prosecution of the Atkinsons and the Hanveys. He was of the view that without better evidence of Mr Hanvey's coat there could be no reasonable prospect of conviction of Allister or Thomas Hanvey

Gordon Kerr QC

Statement

5.10 Para 26: It was not unusual at the opinion stage for counsel not to have a pathology report. It is not unusual to be without one for trial. Given the state of affairs at that stage, an opinion by November for an incident that occurred in May would actually have been quite quick.

5.11 Para 27: In the absence of the pathology report, he made it absolutely clear that he would not be content advising on a joint enterprise without an opinion as to cause of injury. Following the receipt of report, he advised a murder charge against Marc Hobson.

5.12 Para 28: Mr Kerr QC did not know whether the evidence of Mr Bridgett's blood on Robert Hamill's trousers was ever put to Mr Bridgett but he would have expected the police to have questioned Mr Bridgett on it. It was not unusual not to have a full forensics report until over a year and a half after an incident.

5.13 Para 2: Responsibility for directing the prosecution of cases lay with the ODPP.

5.14 Para 3: He was asked to give an opinion on the case after consideration and consulting with witnesses as necessary.

5.15 Para 5: Counsel rules in Northern Ireland would be that he should not consult with a witness without an attending solicitor, and that requirement was fulfilled by the ODPP officer

Oral Evidence

5.16 He was instructed in the murder and at some later point he was asked to advise on the neglect file. No one asked him to consult with Res Con Atkinson (p63). It was very rare in those circumstances to consult with a police officer (p64).

5.17 The consideration of calling Res Con Atkinson was whether he could support the observations and whether there was reason to doubt those observations (p64) of the night of the incident (p65).

5.18 Mr Kerr QC could not recall any discussion about disclosure of a particular statement. The standard disclosure procedure would have been that there was an Officer from the ODPP directing disclosure and counsel would only be instructed where there was some dispute. Before committal, counsel would rarely be instructed (p66). Anything that affected the credibility of the witness would be prima facie disclosable. He could not remember if he advised disclosing Tracey Clarke's statement (p67). 31471 did not take away the references to what had happened. There would be a reason for that, presumably on advice from the police (p69) if there had been a particular reason to exclude a name. The ODPP would redact names if they thought it was appropriate (p78). The defence would need to know which officer had

tipped off the suspect (p70). “Ordinarily”, it would be the position that the Res Con Atkinson allegation would need to be disclosed (p71)

5.19 Para 28 & 29 81416: Re-interviewing Mr Bridgett would be a matter for the police and it was their judgement about whether it would assist them or not. It was also a matter for the ODPP to consider a direction (p72).

5.20 In 17639, the section dealing with “Stacey” was not admissible as (p73) he did not think it qualified under "res gestae" (p74). He did not believe that it was a reaction instantly to something that occurred. The offence had to be continuing (p75). It did not appear to be part of the death sequence. It could be relevant to affray. There was disagreement between him and the ODPP as he thought there was sufficient evidence for affray against a few people (p77).

5.21 He did not recall advising that the name of the Reserve Constable should be redacted from the statement. He did not recall being consulted about it, per Mr Burnside, but he had no reason to dispute that (p80).

5.22 There was an obligation on the police to pursue any evidence that assisted the defence or the case against the defendant (p87). If DI Irwin had not taken Andrea McKee’s statement there would have been difficulties for the case (p88). There might be an issue that once a statement had been made that was clearly false; the witness might need to be cautioned. It would be entirely proper to remind the witness of the declaration (p89). The question of propriety was what was done with the statement (p92).

5.23 He thought that the police had investigated the case very thoroughly (p90). They gave the impression that they wanted to catch the criminals (p91).

5.24 That the police did not believe the alibi was unimportant. The factual circumstances that enabled the ODPP to make an assessment of the alibi's credibility should be on file such as the evidence that made the police think it was false (p94).

5.25 He recalled that there was an explanation for the, not unusual, phone calls between Mr Hanvey and the Atkinsons and there was nothing to show that the explanations were not correct (p100). It was highly desirable from a prosecutor's point of view to have another officer to support Con Neill (p101) The allegation would be disclosable if the witness’s credibility was at issue and the allegation had been disclosed (p103). He doubted he had made the redactions to the statement as it was not Senior Counsel’s job to do so (p104). If the redactions were discussed in front of McCollom LJ then he would have been told of the nature of the redactions (p105). If the defence knew the Officer identified them, the redactions would have been acceptable (p108).

5.26 The purpose of the consultations was to assess the witnesses in terms of their credibility and the likelihood of their giving evidence. Ordinarily memories would be tested but not every detail would be gone over (p112). He went through the statement enough to believe that if Tracey Clarke were to give evidence she could give accurate and detailed evidence (p114). If additional evidence were given, he would expect a note to be made of it (p115). He

would only give her the statement after she had been given a chance to give her account (p117).

5.27 Per 8746, there was an issue at trial as to when the officers had got out of the Land Rover (p118). The real issue was whether the officers should have anticipated the attack (p120).

5.28 For an Article 3 claim the court needed subjective and objective evidence of fear (p123). That would need to be proved beyond reasonable doubt. That could not be done on the facts that Tracey Clarke was giving (p124)

5.29 Mr Prunty was shown photos to try to identify whether the person who he identified (p125) was the person in custody. The best way to test this was to show him the photographs (p126). The analysis was since he lost sight of the man he saw kicking, could he identify that man as Wayne Lunt or did he think they were both Dean Forbes (p128)?

5.30 It would have been his (Gordon Kerr QC's) request that the ODPP direct Mr Bridgett to be interviewed on account of his blood being on Mr Hamill. He did not think that was necessary (p129) as beyond the lie it did not advance the case (p130). There was no need to pass the blood stain on to a different forensic expert as Mr Marshall could have said if it needed further testing and also it was a simple blood spot (p131)

5.31 It was standard to redact anything that could lead back to the statement maker where the witness had anonymity. These redactions were consistent with that (p132). He was aware there was redaction of Timothy Jameson's statement for these reasons (p133). That a solicitor who represented two suspects, one of whom could identify the witness, would receive disclosure that would not provide any practical benefits, did not overrule the need to do things the proper way (p138).

5.32 The difference in view about the bringing charges of affray was that he thought the evidence supported the charge against Mr Robinson, but Mr Kitson did not. Mr Kitson thought the evidence supported a charge against Mr Bridgett (p135). It would not be unusual for them to have a meeting and come to a final opinion (p136)

5.33 He would have wanted to know that proper disclosure had been made before he prosecuted. If it had not been, he would have spoken to defence counsel. He did not recall if that had to happen (p139)

<u>Fiona Hamill</u>

Oral Evidence

5.34 Mr Raymond Kitson alluded to witnesses being intimidated when they were discussing why the case had been dropped when she went to a meeting at the ODPP offices (p4). He did not say which witnesses (p5)

Diane Hamill

Oral Evidence

5.35 She had one meeting with the ODPP. She felt that every chance to drop something was taken (p17)

Roger Davison

Statement

5.36 Para 2: He was Senior Legal Assistant in the ODPP. His main role was as a Caseworker; a role which involved examination of police investigation files and taking decisions as to prosecution. If a decision was made to prosecute, it was also his job to prepare committal papers if the prosecution was to go on indictment to Crown court. Generally, the RUC referred a case to ODPP once they had completed their investigation. The file would go from investigating police to more senior police, then to the ODPP

5.37 Para 3: When a file was received it was sent to Mr Kitson, Assistant Director for Belfast & Eastern region, for onward allocation to a senior legal adviser.

5.38 Para 7: It was the function of the ODPP to consider police files and, in particular, to determine whether there was sufficient evidence to give a reasonable prospect of conviction of any person reported on in the file.

5.39 Para 8: If, on consideration of the file, the caseworker believed that other information was required he would ask the police to make further enquiries. Such a request would be by an Interim Direction.

5.40 Para 9: The decision to prosecute lay ultimately with the ODPP. Once a decision was made, it was communicated by a Final Direction.

5.41 Para 10: The Interim Direction dated 12/8/97 (18106) was not familiar to him and he did not know why Mr Kitson would have issued it. What might have happened was Mr Kitson received the file, noticed a glaring omission and issued a direction before allocating the file.

5.42 Para 11: It did not surprise him that forensics were not available as it often took a long time for forensic, pathology and medical reports to be prepared.

5.43 Para 18: The first direction was issued on 14/10/97 (18092). He advised the Final Direction would await forensics and the consultations.

5.44 Para 22: It was open to the ODPP to take counsel's opinion after a consultation although it was occasionally rejected. It was quite rare for a member of Crime Branch to attend consultations.

5.45 Para 28: A direction to prosecute would have been his decision and he would also make decisions as to those witnesses to be called and to be disclosed.

Oral Evidence

5.46 Per para 8 (81399) an Interim direction asking for more information arose from a working practice, not any statutory power (p2).

5.47 If he was awaiting an additional file and an issue could not be sorted out quickly and efficiently, then he would issue an interim direction. He would have waited until the neglect file arrived before dealing with the murder file (p3).

5.48 Per para 11, the ODPP had a police liaison inspector who was involved in chasing forensic reports (p4). To receive reports the ODPP would contact the officer in charge of the case and follow it up with an interim direction (p5).

5.49 When taking the decision to prosecute, the Caseworker would have had the file. They would have consulted with senior counsel. He could recall but it would be very unusual if it were not the Caseworker's decision as to which witnesses were to be called (p13). When a decision was issued, it took a few weeks before it was produced because the material was sent to typing before the decision was produced (p14). Mr Davison could not recall if he reconsidered using Res Con Atkinson in light of the neglect file but he would have seen the complaint file to consider disclosure (p15). 18148 showed that he had the neglect file (p16). If anything in the neglect file, when he was considering disclosure, meant he revisited a decision to use a witness, he would have made a note so someone prosecuting in court could determine why that decision had been reached (p17). He would not have made a note if he considered something dangerous but continued to use the witness (p18). He did not recall the decisions and facts of the Res Con Atkinson allegation, but when presented with the facts, he said that the decision to use Res Con Atkinson, based on the factors in the file, was within the range of decision a reasonable prosecutor could take. A number of people would make the opposite decision (p19)

5.50 Disclosure would be very important when using Res Con Atkinson as a witness. It surprised him that there was no disclosure schedule for Mr Hobson (p20). He would expect the phone call at 0837 to be disclosed. He would not expect police opinion in the neglect file to be disclosed (p22). It would be a matter of principle not to disclose his opinion (p24). If the defence asked for the prosecution to consult with Res Con Atkinson to determine his veracity, they would not have done it (p25) as it was not their role. He was also concerned that it may be seen that the witness was practising (p26). It was partly true that the consultation system was different because Res Con

Atkinson was a policeman as it was expected that an Officer was capable of giving evidence and would give credible evidence (p27). It did not surprise him that he did not disclose Tracey Clarke's statement to the defence as long as the Res Con Atkinson allegation was disclosed (p28). They may also have taken the view that they would not disclose it due to concerns over her safety. It would have been disclosed if she was going to be a witness (p29).

5.51 If a letter was addressed to Mr Kitson, he would look at it and then pass it on to the appropriate Caseworker. It was probably fair that he would consult on major decisions with Mr Kitson as he was involved and the Director had asked to be kept informed (p33).

5.52 Pre-committal, a decision was taken on the witnesses to be used and primary disclosure. The solicitor usually got disclosure on the day of committal (p34).

5.53 At the time of using Res Con Atkinson, the only information he had was the allegation made by Ms Clarke. There was insufficient supporting evidence not to put him on the papers. Mr Davison could not recall if the decision to use Res Con Atkinson was discussed with Mr Kitson (p36). Mr Davison could not remember anything about the disclosure of the Res Con Atkinson allegation (p42).

5.54 Mr Burnside dealt with disclosure once the case had gone to the Crown Court (p47). Both Mr Davison and Mr Burnside had responsibility for disclosing Tracey Clarke's statement. He had no recollection of discussing that issue with Mr Burnside. He would not expect to discuss disclosure with Mr Burnside (p48).

5.55 Mr Davison stood by what he said about DI Irwin in his statement (p50)

5.56 The bundle solicitors got at committal included a list of material to be disclosed. When that was written, he had not yet received the neglect file (p53). If there were issues about disclosure, that would be included in the note to counsel. That note showed that there was an issue with Tracey Clarke's statement upon which that he wished counsel to advise (p54).

5.57 Per 18277, if Mr Monteith was asking for the maps referred to in an interview, he had those interviews (p55). Paras 1 & 3 of that letter showed that he had done the disclosure he indicated before passing over to Mr Monteith (p57). Mr Davison would have disclosed the October as well as September interviews (p2).

5.58 Jonathan Wright should not be in para 28 of his statement (p62).

<u>Ronald McCarey</u>

Statement

5.59 Para 2: He attended a consultation with Colin Prunty on 30 October 1997. He did not know why as he was concerned with the neglect of duty allegation.

Oral Evidence

5.60 Per 19316, nothing stood out for him that required further investigation in the neglect file. If it had, he would have considered directing it (p138).

5.61 He was not sure that it troubled him that there was the neglect accusation when the officers were to give evidence. They waited until the conclusion of the Hobson trial as something might have arisen before making a final decision (p138).

5.62 He did not consider whether Res Con Atkinson could be a proper witness as he was not dealing with the murder file (p139)

5.63 He did not recall seeing the note **18122** before (p139). He did consider *Dytham* when making his decision (p140).

5.64 When making decisions on the neglect file, Mr Junkin requested it be forwarded to him through Mr Alan White, Senior Assistant Director, after it had gone to Mr Junkin through Mr Raymond Kitson. Mr Junkin was the final decision maker (p141)

Roy Junkin

Statement

5.65 Para 12: He did not recall what was said about Res Con Atkinson in **31608**. He believed that if the allegation had been communicated it would have been recorded.

5.66 Para 13: He did not recall if the issue of how to investigate Res Con Atkinson was discussed at the meeting of 13th May or the issues around Tracey Clarke. If it had been raised by police it would have been recorded.

5.67 Para 15: He had no recollection of when he was informed that the ICPC were supervising such a complaint. If the ICPC had been mentioned, he would have expected it to be recorded.

Oral Evidence

5.68 Mr Junkin was the decision maker in the review process (p11).

5.69 In addition to para 17 the Director asked him to do extra things in July 1999. They are at **18251** (p2). He also agreed with the contents of **18321** (p10)

5.70 There was not enough evidence to prosecute Res Con Atkinson on the basis of a hearsay allegation, without some substantiation, against an alibi (p3). If it was apparent on the crime file that further enquiries were needed, then the ODPP could direct that (p4). The enquiry needed to be necessary or obvious (p5).

Maynard McBurney

Statement

5.71 Para 42: On 10th May five of the six arrested were charged. What normally happened was that the police would go to ODPP with a view to finding out if they were content with the decision.

Michael Matthews

Statement

5.72 Para. 4: In April 2001 it was agreed that final directions on the Res Con Atkinson file should await the conclusion of the related McKee criminal proceedings.

5.73 Para. 6: Whether the cases of the McKees and the Atkinsons should have been put together was a matter for Mr Kitson, but he could see the sense in clearing Mrs McKee before dealing with the others. He felt it was inappropriate to defer sentencing of Andrea McKee until she had given her evidence.

Oral Evidence

5.74 Mr Kerr advised on the murders and prosecuted Mr Hobson. He (Mr Matthews) was not aware Carl Simpson QC advised on the neglect file. Mr Simpson QC prosecuted the McKees and advised on issues such as deferring sentence of Andrea McKee and Gerald Simpson QC advised on the prosecution of the Atkinsons and Hanveys. There was nothing in the change of counsel beyond happenstance (p210).

5.75 He felt that the content of the call did not need to be established. They needed to establish the existence of the call and that a cover-up story had been invented. They needed to establish that there was an agreement or misleading statement which diverted the police in their enquiries (p211). That followed from Mr Simpson's decision that without more information about the coat, Allister and Thomas Hanvey could not be prosecuted (p212)

Carl Simpson QC

Statement

5.76 Para 2: He was instructed by the ODPP in the case of R v McKee and McKee

5.77 Para 3: His involvement was limited to the prosecution of the McKees. He was instructed by Mr Raymond Kitson. The only advice he gave was in respect of deferring sentence of Andrea McKee. On 31st January 2002, there was a meeting at which that issue was raised and he was asked to summarise the legal position. He advised it was neither appropriate nor desirable and the evidence would be weakened by the link to future punishment. It was not put as something the police intended or wanted to do. It was simply advice.

Gerald Simpson QC

Statement

5.78 Para 7: A meeting on 26th February 2004 was arranged to discuss a request by the Director that he consult with Andrea McKee to assess her credibility. The meeting considered whether and how the proceedings could be progressed in light of difficulties which had arisen regarding Andrea McKee's credibility

5.79 Para 8: The consultation was arranged for 2 March 2004. It was necessary because Andrea McKee had failed to attend the committal hearing and her reason for non-attendance appeared to be false. For the consultation he was given copies of the witness statements obtained from Pendine and copies of the Officers' statements which related to that investigation. He formed the impression that Mrs McKee was telling lies and could not be relied upon as a witness of fact. He believed that, together with the fact that she was an accomplice witness, was fatal. Without Andrea McKee's evidence, there was no reasonable prospect of conviction.

Oral Evidence

5.80 Per 2043, an Opinion of 30th August 2002, he had Andrea McKee stating the agreement part of the conspiracy. They also needed an act which was intended to pervert the course of justice (p20). He accepted she could give evidence about the agreement but also about the actual phone call having been made by Res Con Atkinson as a result of his admission. He could not remember all the detail he had had and what was in his mind at the time but he was clear her evidence was needed to show the detail of the conversations, as well as the circumstances which prevailed at the time (p22). He also felt that the phone call needed to be linked to the tipping-off allegation. He felt she could link all of that up to provide a reasonable prospect of conviction (p23).

5.81 In his Advice of 16th March 2004 (33915) he did not hold it against Mrs McKee that, having been due to attend on the 22nd, she had an appointment on the 23rd. He did not come to a conclusion about it and he neither came to a conclusion about the letter but they were matters that were part of the overall consultation (p25). Mr Simpson expected his opinion to be considered with care by senior members of the ODPP, including Sir Alasdair Fraser (p27). He did not remember if he was told the terms of the adjournment of 22nd December (p28).

5.82 He did not know if the two statements from the doctor's surgery were sufficient for a medical certificate. He felt that if there is a medical certificate showing a doctor visited the child on the 22nd that might well be satisfactory (p31). He did not recall seeing the terms of the adjournment or the medical certificates at the time (p32). It might have affected his advice if he had known the terms of the adjournment but he did not know (p38). Mr Simpson agreed that he had seen the content of the medical statements in a summary of events created by Mr Ivor Morrison (p49). Mr Simpson also would have been aware of the situation regarding the adjournment from Mr Morrison's summary (p60).

5.83 Mr Simpson was asked to speak to Andrea McKee, particularly about Pendine. He was then to advise on her credibility about all of the evidence (p33). He was to consider if there was a reasonable prospect of conviction if she gave evidence (p34). He did not think there was (p35).

5.84 He felt the issue of Pendine could not emerge at trial or the committal as his duty would have been to notify the defence that the witness had told lies so it would have emerged in the preliminary magistrates hearing (p38). He was not aware that the ODPP considered there would have to be a specific hearing about whether the adjournment had been properly granted (p39)

5.85 Mr Simpson felt Andrea McKee's lie was a very big lie but this conclusion was predicated on the assumption that the adjournment was not justified. He assumed he was brought in to deal with the point as there was a problem with the explanation given to the Magistrates' Court (p40). Mr Simpson felt that the lie about Pendine was very concerning and it was not important whether that was the reason for the adjournment or not (p57).

5.86 No one at the ODPP asked him to revisit the situation after the advice. He was not aware that the Attorney General raised an issue with the Director in respect of the corroborative value of the initial plea of Andrea McKee (p43).

5.87 Mr Simpson was not sure if he could answer the question that an investigation was required as the defence felt Mrs McKee had no justification for not coming to the hearing (p45).

5.88 The factors that Mr Simpson considered in relation to Andrea McKee's truthfulness about Pendine were the absence of any record in Pendine or her GP's office; the absence of any telephone records and the reaction to the proposition that there was no grey-haired doctor on duty that night. Her explanation to that was that she then suggested she had not gone into the consulting room. That was completely at odds with the account she had given Miss Christine Smith (p50).

5.89 Mr Simpson appreciated that a cross-examination could not go behind her answers as to credit (p36) but in Northern Ireland, counsel got away with more cross-examination about somebody telling an obvious lie. He agreed something could not be put to the witness that was not allowed by the rules (p37). His experience was that a witness telling lies on a non-central issue

would be rigorously cross-examined on those lies (p52). It would have been permissible to put that she (Andrea McKee) had told Miss Christine Smith that she had been in a consulting room with a grey-haired doctor and that she had told him the reverse because he would have arranged for a statement setting that out to be served on the defence. Mr Simpson felt it would be legitimate to put that there were no telephone or other records of her attendance as he would have included that in the statement (p53). He would not have objected to that question in any case (p54).

5.90 Mr Simpson felt that if Andrea McKee told a lie so brazenly that they become damaged in cross-examination then it would taint her whole evidence (p55). He was not satisfied that she was intrinsically a truthful person and without her evidence there was not sufficient evidence to provide a reasonable prospect of conviction (p58). He had considered it relevant that Mrs McKee attended court on 27th October but he was not sure that it is relevant that she maintained reliable contact with the police (p61). His first opinion was very positive about Mrs McKee. He was shocked by how brazen Mrs McKee was in lying during the second consultation (p63). He was taking a careful look at the witness as she was already a flawed witness by pleading guilty. If she had produced a rational explanation for failing to turn up, even if it was she did not want to attend, he would have produced a statement to the defence and proceeded (p65).

5.91 Mr Simpson stated that it appeared that the son had a medical history but he did not believe she was telling the truth about Pendine (p65) as all the documentary records were checked and there was no evidence suggesting contact (p66). The lie she was telling was not about her sick son but about going to Pendine, an issue that was collateral to her evidence at trial. That this was a committal was immaterial as he was interested in what would happen at trial (p69).

5.92 Mr Simpson did not recall if anyone instructing him made a comment as to Mrs McKee's credibility, but it would not affect him as he would not rely on anyone else's assessment (p71).

<u>Raymond Kitson</u>

Statement

5.93 Para 8: He was the ultimate decision maker on the Hamill murder file although he delegated responsibility for certain parts of the process to Roger Davison.

5.94 Para 9: He assumed the whole of the neglect file, including the Res Con Atkinson allegation, was being supervised by ICPC. He reallocated the murder file to Mr McCarey on 16 February 1998 as it warranted a fresh pair of eyes. The ultimate decision maker was Mr Junkin.

5.95 Para 11: He was not involved in the prosecution of the Atkinsons and Mr Hanvey. Mr Morrison assumed responsibility for this file from Mr Matthews in October 2002.

5.96 Para 12: He was the decision-maker on the Timothy Jameson file. The evidence was insufficient to sustain a prosecution.

5.97 Para 14: He was at the meeting on 13 May. The principal question was about bail. There was a discussion about handling the statements of Timothy Jameson and Tracey Clarke and the need to protect their identities.

5.98 Para 15: He read the statements of Mr Jameson and Ms Clarke at that meeting.

5.99 Para 17: He could not recall if DCS McBurney informed them of the Res Con Atkinson allegation. He would have been aware of it from reading her statement.

5.100 Para 19: Both he and Mr Junkin were informed at that meeting that Mr Atkinson was subject to further investigation.

5.101 Para 24: Mr Kitson assigned the case to Roger Davison at the beginning of October 1997.

5.102 Para 27: The file was passed back to Mr Kitson on 24 October as Mr Davison was due to go on leave.

5.103 Para 32: He would have discussed adducing Tracey Clarke's statement under Article 3 with Gordon Kerr QC on 27 October. He would have pursued this option if he thought there were any real prospect of success. Tracey Clarke saying that she did not want to give evidence because she loved Hanvey and was loyal to the accused did not meet the threshold for admission of an Article 3 application.

5.104 Para 34: Such an application would also not be admitted because her statement was so central to the case against Mr Forbes, Mr Hanvey and Mr Robinson, that a judge would be unlikely to admit it without an opportunity for cross-examination.

5.105 Para 35: He did not believe that prosecuting them for summary public order offences was in the public interest due to the time they had already served.

5.106 Para 36: The same considerations applied for more serious public order offences. In the absence of Ms Clarke and Mr Jameson, there was no evidence against Mr Forbes and Mr Hanvey. Mr Kitson believed the evidence against Mr Robinson was insufficient to establish affray. It established disorderly conduct, but this charge did not meet the public interest test.

5.107 Para 38: The Res Con Atkinson allegation would have been relevant to a murder prosecution, particularly against Mr Hanvey. If the police file had been available, he would have considered the two files side by side. However,

without the evidence of Ms Clarke there was no evidence against Mr Hanvey and nothing to support the tipping off allegation.

5.108 Para 43: Mr Prunty was shown at least three photographs, one of which was Mr Forbes and one of which was Mr Lunt. It was not a formal identification procedure and the prosecution would not have been able to adduce that identification evidence at court.

5.109 Para 44: Prior to the Prunty consultation, the case against Mr Lunt had rested on two propositions, the first of which was that the man Mr Prunty had seen kicking was the man who had been taken to the Land Rover.

5.110 Para 45: The second proposition was that the person who had been taken to the Land Rover was Wayne Lunt.

5.111 Para 46: Mr Prunty's evidence fatally undermined the first proposition.

5.112 Para 47: When it became clear that Mr Prunty would say that the man he saw attacking Mr Hamill was not Wayne Lunt, it became impossible to rely on his evidence.

5.113 Para 48: A charge of affray was considered against Wayne Lunt but the evidence was considered insufficient. As he had spent six months on remand, minor offences were rejected.

5.114 Para 55: Mr Kitson agreed with Mr Kerr's view that the blood spot evidence was capable of proving that Mr Bridgett was in or around the scene at the time but they could not prove exactly when or what he did.

5.115 Para 56: Prosecuting Mr Bridgett for affray was considered as he had been seen by Mr Wright trading punches. Mr Kerr considered that it was not possible to prove exactly what Mr Bridgett had done.

5.116 Para 57: On reflection, Mr Kitson agreed with Mr Kerr. The evidence of Mr Wright could not say who had started the fight and the possibility of self-defence could not be excluded and the use of force in self-defence was not "unlawful fighting".

5.117 Para 58: There was nothing to be gained by giving Mr Bridgett an opportunity to explain the bloodstain away. A further interview would have been more likely to weaken the prosecution case than strengthen it.

5.118 Para 59: Seeking further forensic tests was a matter for the police and FSANI. Mr Marshall was the leading expert on blood staining in Northern Ireland at the time. There was no basis for instructing another expert.

5.119 Para 60: The evidence of Res Con Silcock regarding the woman at the scene was not, in Mr Kitson's opinion, *res gestae*.

5.120 Para 62: He and Mr Kerr QC disagreed on the prospects of prosecuting Mr Robinson for affray. Mr Kitson felt the evidence was insufficient to support

"unlawful fighting". Mr Kerr QC disagreed but after the consultation on 18 November, Mr Kerr QC agreed with Mr Kitson.

5.121 Para 70: At the time the decision was made to call Res Con Atkinson as a witness there were suspicions about him, but no evidence on which to prosecute.

5.122 Para 72: Gordon Kerr, who had advised on the murder prosecution and who had conduct of the prosecution of Marc Hobson, was instructed to advise on the neglect complaint and the Res Con Atkinson allegation to ensure the counsel advising on disclosure in the Hobson case would have full knowledge.

5.123 Para 88: The review of prosecution decisions reached the same conclusions as the ODPP.

5.124 Para 89: David Perry QC reached the same conclusions as the prosecution did in his opinions.

5.125 Para 91: On 26 June 2000, Mr Kitson had a meeting with DCS McBurney. DCS McBurney was looking for advice on the issues of whether he had been right to take a witness statement from Andrea McKee and how he should proceed with Michael McKee.

5.126 Para 92: Mr Kitson was clear that these matters were for the police.

5.127 Para 101: It was Mr Kitson's experience that it would be a good idea to sentence Andrea McKee before she gave evidence to avoid an argument that the witness had an ulterior motive.

Oral Evidence

5.128 The investigation and reporting of offences was for the police (p30) and for the Director to take prosecutorial decisions. In 1997, there were arrangements for police to consult with staff of the ODPP so that they did not make unnecessary enquiries. The ODPP staff could also point out additional information the police might want (p31). He was describing what was contained in 75353. This was not an exceptional situation as there were arrangements in place (p32).

5.129 The police would advise the prosecutor of any circumstances relevant to bail (p33).

5.130 The meeting described in 31603 was to discuss the bail applications which would take place. It was not a strategic meeting to the course of the investigation (p35). Per 927, Mr Kitson thought it was sensible to resolve the issue of cause of death (p36) but it was not a direction. 31611 was written after DCS McBurney reported back. It was a confirmation that prima facie the cause of death was attributable to the head injury (p37).

5.131 Mr Kitson was either told of the Res Con Atkinson allegation or read Ms Clarke's statement. This was in the meeting of 13th May (31608) (p38) "Subject to further investigation" must have come from a discussion but he could not recall it (p40). If someone had said they were getting phone records, he would probably have written that down (p41). DCS McBurney did let those at the meeting know at the beginning that there was an issue (p86). The issues were gone through one by one. He did not know why there is an exclamation mark by "Atkinson" (p87).

5.132 18122 was an internal minute. The file would have come in from the police and then the note would have been added to it (p43). A copy of the note should have been added to the neglect file. The murder crime file would have had the original on it. It would probably have been the only one extant (p44). He understood that the Director would have wanted to know what was happening before final decisions were taken. He thought that if an associated complaint file came in, it would be sent to him (p45) The "Dytham" reference was from a quick look by the Director's research assistant as a note to readers (p46) for when they looked at the complaint file (p47). Unless the date was wrong, he did not know how the assistant knew as it was 2 days before the file arrived (p46). There was a note in the murder file that there would be a file relating to the tip-off (p48).

5.133 He did not decide which witnesses would be used after deciding to prosecute Mr Hobson for murder. Mr Davison had control of the file (p49). In the normal course of events, they would have waited for the tip-off file but a discussion between Mr Davison and DI Irwin and how Drumcree had changed attitudes led to consultations and decisions on which witnesses to use (p50). Mr Kitson was satisfied that the prosecution test was met on the evidence against Mr Hobson. He was aware of the Res Con Atkinson allegations before making a decision in the Hobson (p51). He did not know what would be in the file but he knew the allegation was hearsay. He did not see a reason to defer due to the hearsay and that Tracey Clarke would not be available as a witness (p52). Mr Kitson informed the Director. He did not consider Dytham as he did not consider it relevant (p53).

5.134 He would have considered using Res Con Atkinson as a witness as the allegation against him was hearsay and Tracey Clarke was absent. Res Con Atkinson gave probative evidence in relation to the nature of the attack on Mr Hamill. It would be a disclosure issue (p57). There would be a risk the defence would use the allegation against Res Con Atkinson (p58).

5.135 Mr Kitson did not believe the defence would be entitled to DCS McBurney's comments as they were entitled to the facts, not the police view (p58). In those days, disclosure occurred after committal except in exceptional bail circumstances. With a scheduled offence, disclosure was dealt with by a disclosure officer at the Crown Court. As a matter of course Mr Burnside should have had the neglect file (p63). Mr Kitson would have disclosed the Res Con Atkinson allegation, or the gist of it, to Mr Hobson (p64). He had not considered whether it would be appropriate to disclose the phone records or Mr Kerr and Mr Davison's consultation notes. Facts would be disclosable; opinion would not (p65).

5.136 For Article 3, the fear could be openly expressed or it could be inferred. It had to be proved beyond reasonable doubt, on admissible evidence, that the witness was in fear (p68). There had been cases where it had been used where the witness's reason had not been believed (p69). They would make an application to the court if there had been a mixed message, one of which was fear (p71). The preponderance of Ms Clarke's reasons were not fear (p72).

5.137 Mr Kitson thought the police should have interviewed Mr Bridgett when they found out about his blood being on Mr Hamill's jeans (p72). He could have requested that. Once there was insufficient evidence to prosecute, there was no reasonable expectation that an interview would produce anything (p73). Mr Davison asked for more information about the blood spatter and he realised the relevance of the questioning and, as he was the Northern Irish expert, it was reasonable to assume (p75) that nothing would come of it (p76).

5.138 Mr Kitson believed that the person who identified "Stacey" to Res Con Silcock denied making the comment. He did not take that into account as he was not aware of it at the time (p79). He did not accept that it was "res gestae" but said it would not be liable to be admitted as there was no witness to cross-examine. He did not think a Northern Irish judge would admit it because "of course it was res gestae" but the absence of the witness would result in the judge ruling it unfair. He was going on advice of counsel regarding this evidence as counsel was greatly experienced (p80).

5.139 Mr Kitson formed the view that the evidence was not sufficient to charge Rory Robinson with affray (p80) because he did not see any evidence of Mr Robinson being involved in any direct violence (p81). He took the view that Res Con Atkinson's statement was in terms of being disorderly as opposed to affray as there was no evidence Mr Robinson had perpetrated, been involved in, or even encouraged, any direct violence on the injured parties. The batoning was after the event (p83). Mr Kitson acknowledged that the violence was spread over the junction and it was possible violence continued after the men were on the ground. "There was no evidence he took part in any violence" or encouraged or intended to encourage it (p84).

5.140 Mr Kitson could have suggested combining the murder and tip-off allegation but the operation of the investigation was a matter for the Chief Constable (p89). His assumption was that it was being properly investigated. There was no discussion at the ODPP about whether the investigations should be combined (p90).

5.141 If he had been told of Mr Bridgett's blood being on Mr Hamill on 13th May, then he would have noted it (p90). Per 31613, Mr McGill knew of the blood. The ODPP could have requested, directed etc the police to interview Mr Bridgett (p93). It was a judgement call about whether to reinterview Mr Bridgett (p95),

5.142 He gave the murder file a very preliminary read-through in August but he did not identify a lack of confrontation evidence (p96). His colleagues identified

such concerns (p97). He had a preliminary read through as lots of the supporting evidence, e.g. post mortem, was absent (p105).

5.143 DCS McBurney was a dedicated and thorough investigator (p98).

5.144 If there was sufficient evidence against two individuals to pass the test for prosecution, and there was a connection between the conduct, then generally they would both be on the same indictment and also the same file (p100). With the facts of the case involving Res Con Atkinson he would expect them to be on the same file but it was a matter of strategy for the police (p102).

5.145 If Res Con Atkinson had confessed, then that would have been submitted as a supplementary file, and the Hanvey case would have been revisited (p108). They had to make quick decisions about those to be prosecuted once Ms Clarke and Mr Jameson had withdrawn their evidence. If new information had come in then the decision would have been reconsidered (p110).

5.146 He did not know that the alibi came from Andrea McKee who had provided the information about Tracey Clarke (p114). He would have expected that if an Officer did not believe a witness, this would be included in the file (p115).

5.147 The Monteith letters regarding disclosure would have been read by himself (p117). In February 1998, the committal was imminent and initial disclosure had been served on Mr Monteith. His involvement in the case lessened after taking the decision to prosecute Mr Hobson. He had the case back when Mr Davison was on leave between 24th October and early November (p120). Generally, he would not have had a hands-on involvement in the case as his position had a supervisory role (p121). Day-to-day decisions were in the hands of the Case officer. He did not recall Mr Davison asking for advice (p122). He was not sure that he saw the letter from Mr Monteith on 18th March (p124). There would be consultation between the disclosure officer at the Crown Court and the Case officer (p131). There was no consultation between Mr Burnside and Mr Kitson (p132). Mr Burnside would only go to the Case officer if there were issues upon which he wished to consult (p132). Mr Burnside might well have discussed issues with prosecuting counsel (p133). Mr Kitson had no dealings with disclosure (p135).

5.148 The handwritten note at 31611 was an add-on note and 19068 was a follow-on note to that (p138).

<u>Sir Alasdair Fraser</u>

Statement

5.149 Para 5: The broad and important principle was that conduct of an investigation was for the Chief Constable.

5.150 Para 6: In a complex case it was open to the police to seek advice in relation to prosecutorial matters.

5.151 Para 18: That the police did not believe Andrea McKee's alibi statement should have been drawn to the ODPP's attention.

5.152 Para 24: It was important to inform the Attorney General fully as to what had occurred, following the request on 10 December 1997.

5.153 Para 25: The principle differences between Mr Kerr and Mr Kitson were their views on whether there was sufficient evidence to charge people with affray.

5.154 Para 29: Mr McGrory's letter of 20 July 1999 caused him to review the prosecution decisions taken. He put the responsibility on the Deputy Director to oversee the review to ensure it was conducted thoroughly.

5.155 Para 30: He would not describe a review as unusual, but it was not a frequent event. If he considered there to be a risk of being judicially reviewed, then he would want to be sure everything was in order.

5.156 Para 33: It would not have been proper for the Government to comment on 37620 as that would have been trespassing on his independence, about which he was protective.

5.157 Para 39: Sir Alasdair Fraser believed the ODPP would have had an interest in the statement of Andrea McKee in June 2000 and would have thought that, had DCS McBurney come seeking advice, a means of offering advice could have been found.

5.158 Para 40: Sir Alasdair Fraser did not believe that Mr Kitson was being difficult. The police were clearly skirting in or about the issue of immunity for Andrea McKee, for which Mr Kitson had no authority.

5.159 Para 45: He was at the meeting on 26 February 2004 where he asked Mr Simpson to consult with Mrs McKee as he needed to be sure that every proper step to advance the case had been taken. He expressed the view that in all the circumstances the witness might remain credible.

5.160 Para 46: It was Sir Alasdair Fraser's decision not to proceed with the prosecution on the basis of Andrea McKee's general credibility. His decision took into account advice received from Senior Counsel, Miss Christine Smith and Mr Ivor Morrison.

5.161 Para 47: He believed Mrs McKee would continue to lie under cross-examination. She demonstrated a capacity to change her story when necessary and he did not regard the events at Pendine as being merely peripheral. They had moved to the centre of the issue of credibility.

5.162 Para 48: He was satisfied a judge would have inevitably exercised his discretion to warn the jury to exercise caution before acting on Andrea McKee's evidence without supporting independent evidence.

Oral Evidence

5.163 The test for prosecution was constant and was applied equally to every individual reported (p47). The mode of trial and the case had no effect on the test (p48).

5.164 Sir Alasdair Fraser did not know that Mr Jameson and Ms Clarke had given inconsistent answers (p48). The purpose of consultation could range from examining evidence to clarity of recall to credibility. The purpose of the consultations with Ms Clarke and Mr Jameson was to test their evidence. The Andrea McKee consultation was to test her credibility (p50). Sir Alasdair Fraser was surprised that the ODPP were not given the questionnaires of Ms Clarke and Mr Jameson. Sir Alasdair Fraser did not give consideration to consulting with Res Con Atkinson (p51).

5.165 Per para 18, 19 and 20 (81955), it was inevitable that when the police found the account given by Andrea McKee did not match the medical evidence, that they would conduct enquiries. It was a matter for the police to advance, not the ODPP (p55) but the prosecutor would tell the police what he wanted to be informed about (p56)

5.166 Sir Alasdair did not recall being shown the notes of Christine Smith's consultation on 9th January (33991) (p57). He understood that the court had been told the adjournment had been granted on the basis of the story Andrea McKee had told DC Patricia Murphy. The medical evidence did not support that and so it was reasonable for the police to seek to obtain evidence from the doctors. He was not aware that the doctor's records were so bad that a visit was not recorded (p58). A possibility was that they could have looked for a medical report from the GP. Another possibility was that police would obtain evidence from Pendine (p59). He thought that the observation that the police should have gone to the GP for evidence of mumps (as Andrea McKee said Pendine only dealt with Calpol) was reasonable (p60). Sir Alasdair Fraser did not consider the distinction between para 35 33919 and the memo from the 16th (33914) (p64). He agreed that para 35 expressed a view that the magistrate would be unwilling to allow proceedings to proceed. That was not an issue in his mind and he doubted that the magistrate could make such an order (p65).

5.167 He had seen 20098 but had not studied the transcript (p65). As of 2004, he did not have any reason to believe the pleas were entered on a false basis. He did put his mind to whether a jury or a Diplock judge would take such a view at trial (p71). He did not consider the issue by itself but it was a factor that was considered (p73). He had not checked on whether Andrea McKee had been consistent in her story since 2000. That would be relevant to the issue of her credit. He did not check as he had counsel and a senior Officer to do so (p74). He would expect counsel to draw attention to any inconsistencies. He could not say whether counsel told him of the consistencies in her story (p77). At the consultation on the 9th it was reasonable that her elaborations would have directed a reasonable person to make enquiries of the GPs, but the police had taken it forward in a different direction. Andrea McKee was not used on the

back of a comment about Pendine. He would reach the same decision if he had to take it again (p78).

5.168 There had been consultations over the years at a very early stage involving senior police from Headquarters. Per para 16 80237, he would make a point at a consultation to enquire on whose behalf people were present (p80) so that he could take a view as to what degree of supervision existed (p81).

5.169 Per para 17 80237, it was open to the police to let the ODPP know of the evidence against Res Con Atkinson before the file were submitted, when they first became aware of the evidence (p82). Sir Alasdair Fraser did not know if knowledge of the phone records in mid 1997 would have led to a different view being taken of Res Con Atkinson being used in the murder prosecution (p83). There would have been a discussion about Res Con Atkinson being charged as a co-defendant (p86).

5.170 Sir Alasdair Fraser believed that the police were remiss in not reporting that Andrea McKee had brought in Tracey Clarke (p87).

5.171 He (The Director) was independent but subject to the superintendence and direction of the Attorney General (p88). In certain cases, the Director wished to take the Attorney General's view. The Attorney General would be informed of what the Director was doing (p89). 40221 was a reflection of Mr Morrison's views and the Director thought Mr McGinty had drawn from that (p91).

5.172 He recalled the meeting on 26th February with Ivor Morrison, Mr Simpson and Mr Raymond Kitson (33979) (p92). He said that as a prosecutor, it was not for him to determine truth, but whether they could determine credible evidence (p94). In that meeting he was saying that Andrea McKee might remain credible on the main issue. He was not shutting doors (p95). Mr Simpson QC was instructed to consult with Andrea McKee and advise on her credit. Pendine would have been included in that (p97). He thought that they anticipated a reasonable prospect of meeting an abuse of process application by the Atkinson team (p98).

5.173 He could not recall if Mr Simpson's original opinion (20050) had been revisited but he was sure that Mr Simpson had it in his mind (p105). Mr Simpson's second opinion set out a clear view of the witness (p109). After the Attorney General had asked him to visit the issue on the guilty pleas of the McKees, he, the Director, had not asked Mr Simpson as he had already answered the question (p110).

5.174 There were two issues: the explanation put to the magistrate and whether the witness was someone who counsel believed to be credible (p107).

5.175 Andrea McKee's previous clear record would have been a relevant consideration. Her cooperation needed to be tempered with the fact that she gave a false alibi statement (p114). It was normal for people in her situation to be sentenced first and then for them to provide evidence (p115). He was not

aware of any inducement for Andrea McKee and he would have expected to have been told if there had been (p116).

5.176 In his statement where he mentioned in cases of a sectarian nature there was an extra onus on the prosecutors to bring a prosecution, he was illustrating a public interest consideration in Northern Ireland. That factor was present in this case. He was not sure the cover-up had a sectarian overtone (p118).

5.177 He did not accept that there was no appetite within the ODPP to proceed with the prosecution (p119).

5.178 When a witness lied to a prosecutor in connection to the giving evidence process, it raised concerns about her credibility, but the prosecutor had to consider the witness in the round (p120). Prosecutors had to be careful not to place themselves in the manner of the judge or jury in determining the facts. They had to determine whether the individual was capable of belief (p121). The decision made in this case was one which was in the range of reasonable decisions (p122).

5.179 Counsel's view was that without Andrea McKee there was no case against the Atkinsons and Mr Hanvey (p123). He felt that the judge may have formulated a reasonably firm warning about Andrea McKee's evidence. The warning would have been similar to the warning given in England (p124).

5.180 If the magistrate wished to end proceedings, he would set a date for committal and then end it. It was not a relevant consideration in his assessment when or whether the magistrate could end the committal proceedings (p127).

5.181 When he wrote to Kevin McGinty he was informing the Attorney General that he was intending to end the prosecution so that the Attorney General had an opportunity to speak to him if he so wished (p128). He presented the reason for discontinuing proceedings as the lack of credibility of Andrea McKee as otherwise there would have been a way of getting the defendants back into court (p129).

5.182 Andrea's reason for not coming to court on 22nd December was a live issue and the prosecution needed to show that the adjournment had been granted on a proper basis (p130). He was expecting the need to assure the magistrate on 27th February that the prosecution had acted properly, and that there was an explainable discrepancy, if required, between the medical evidence and the basis of the adjournment (p132). There was nothing wrong in paras 18, 19 or 20 of Mr Simpson's statement (p134). Per 33980, regarding Mr Simpson's assessment of Andrea, he was the ultimate decision-maker but he was not able to assess the witness himself. He was reliant on counsel's opinion and that opinion could be demonstrated once the evidence had changed (p136). Mr Simpson's consultation was the final determining factor (p138). He would have wanted counsel to be completely candid with the court (p138). That would have included any shortcomings by the ODPP (p139).

Kevin McGinty

Statement

5.183 Para 2: He advised the Attorney General on their responsibilities in Northern Ireland.

5.184 Para 4: On occasions, the Director would indicate to the Attorney General that he was minded to reach a decision and would provide the Attorney General with the information on which the decision was based. This allowed the Attorney General to comment before a final decision was reached.

5.185 Para 5: The Director remained independent and the final decision would always be his.

5.186 Para 15: The note of the conversation that Andrea McKee had with Patricia Murphy was not part of the papers put to the Attorney General.

5.187 Para 16: It was a well known defence tactic to have witnesses called at a preliminary inquiry to see if they would turn up and give evidence.

5.188 Para 18: The doctor's statements did not support the degree of illness claimed by Mrs McKee.

5.189 Para 19: By making the claim she did, the issue became not whether her child was ill but had she been truthful in her explanation.

5.190 Para 20: The result of further enquiries was that Mrs McKee was prepared to put forward a complex and untruthful account.

5.191 Para 21: Mr Simpson's opinion in support of the Director's statement would have been persuasive for the Attorney General.

5.192 Para 23: In light of the material placed before him, the Attorney General was satisfied that the decision to discontinue was a reasonable one.

Oral Evidence

5.193 Per paras 18, 19 & 20 (81961) Mr McGinty did not have the statements of the Drs in March 2004 (p2). He had been told the medical evidence but did not have the statements (p3). "It was inevitable the prosecution needed to seek more evidence" meant the ODPP. If there had been a medical report showing the symptoms Andrea McKee said her son had had, it would have changed his decision (p5). He had frequent calls with the Director. It is possible he was given all the information, including that beyond the documentation he received on 18th March (p6), but he had no recollection of it if it happened (p7). If a fact was not in the documents and he had not been told about it by the Director, he would not have known about it (p8). He did not recall being told about Andrea McKee's child's illness in the detail in 33991 (p10)

5.194 Mr McGinty saw the difference between Andrea McKee being incredible in 33991 and the note by Mr Morrison that stated that the evidence would not support the reasons for the adjournment (p12). There were two issues. The first issue is why Andrea did not turn up to the committal. The second issue is whether the evidence would be sufficient to be able to be left to a jury. His view, which he was fairly sure he put to the Attorney General, would be that the magistrate would stop the committal. He would have told the Attorney General if there were differing views on whether it could be stopped (p13).

5.195 He had never seen 20998. He was aware on 18th March that Mr Morrison believed the proper pleas were entered. He saw no reason why a jury should not believe those pleas (p18). He would have passed any information he believed relevant on to the Attorney General. If he had been told Mr Morrison believed Mrs McKee, he would have raised further questions with the Director to clarify the issue. He wanted to provide as accurate a position as possible to the Attorney General (p19).

5.196 He was not sent Mr Simpson's earlier Advice dealing with Andrea McKee's credibility (p20) and did not think he had been aware of it when advising the Attorney General as otherwise he would have disclosed it to the Inquiry (p21).

5.197 Per 33986, the Attorney General would have been aware Andrea McKee had pleaded guilty as he was well-informed of the case. Having not intervened in the Director's decision, he was anxious the Director gave as full an explanation as he could as to why he reached that decision (p22)

5.198 The test to be applied by the Resident Magistrate was that there was sufficient evidence to put the case to trial (p24). He believed that if the prosecution witness did not turn up, then a defence application should be expected that the case should not be adjourned; it should be stopped. He believed that the relevant reason for stopping (the proceedings) was that Andrea McKee could not be put forward as a witness (p25). The question at the end of the day was whether the case could proceed to trial with Andrea McKee as a witness (p26). If the case had been stopped for non-attendance, the case could have been brought again (p27).

5.199 He was sure that he had been told that Andrea had mentioned Pendine on 30th December (p29). The document that showed that there was a possibility of mumps and ear infections would have gone to the Attorney General (p30). The medical reports did not fully support the diagnosis that had been the subject of representations but by making the claim, the issue arose whether she was truthful in her explanation for her failure to attend (p31). The question was whether or not she had given sufficient justification for not appearing, although the child was undoubtedly sick (p32).

5.200 He attached great weight to Mr Simpson's advice as he knew him personally (p32). From reading his note on the consultation, he noted Andrea McKee had changed her story to accommodate an inconsistency (p33).

5.201 When there was an oral meeting between the Attorney General and himself, the Attorney General would put his views and ask questions on issues after having read the papers and the written briefing (p33).

5.202 Per Para 22 (81962), the issue before the Attorney General was whether the conclusion the Director was minded to reach was a reasonable one. The question was, would the prosecution test be met (p34). Had he not thought the decision was reasonable, he would have had the power to direct a different one. In practice, he would have gone back to the Director. The Attorney General took the view that on all the papers, it was a reasonable decision. The Attorney General took the decision very seriously (p35). Mr McGinty's decision would have been the same even if he had had all the information put to him in cross-examination (p37).

5.203 He could not remember the context in which the Attorney General had asked him to raise the issue of the McKees' plea. It was probably so that the prosecution could explain their decision not to continue with the prosecution if asked about the issue (p37). If there was a question to ask the Director, he would have had had to go back to the Attorney General (p38).

5.204 He believed, on the basis of a letter she had written, that the current Attorney General believed that the Director should not be included in the Inquiry's terms of reference. He agreed (p40). He agreed that there was a risk that his answers about documents not seen and to be interpreted by a previous Attorney General might be coloured (p41)

5.205 If there was something that had suggested that not everything in the Director's Minute was accurate, then he would have gone back to the Director (p43).

5.206 He did not believe that he had heard anything in evidence that would have changed his briefing or the Attorney General's decision (p47).

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We are concerned by Raymond Kitson's statement that, "He would not be surprised if it showed that the ODPP were aware of the Atkinson allegation on 12th May as DCS McBurney knew the ODPP staff on a very personal basis. There might have been a relaxed discussion between them, in order for him to seek support for police progress." (5.3) In light of the many concerns we have expressed, particularly in module 12, about the DCS McBurney's handling of the case, and the protection he extended to RC Atkinson, we suggest that the Panel will want to bear in mind that what has emerged on paper and even in testimony is unlikely to be the whole picture. It is impossible to know how many informal, or as Mr Kitson puts it, relaxed, discussions may have gone on behind the scenes. Northern Ireland is a very small place, where people have multiple connections, often through family and friends, and where informal networks flourish. There is nothing inherently wrong with that, but where a person is setting out to subvert the

proper channels, as we believe DCS Burney did, then those connections and networks are easy to exploit.

An example of that exploitation is the fact that DCS McBurney, having risked collapsing the prosecution of the McKees by interviewing Andrea McKee as a witness rather than under caution, only sought the DPP's advice after the fact (4.98), thus presenting the DPP with a fait accompli.

It is a matter for the Panel to decide, but it seems to us that the DPP gave insufficient consideration to the consequences of dropping Andrea McKee, who was an essential prosecution witness against RC Atkinson for conspiracy to pervert the course of justice. We can find no evidence that the DPP weighed up Andrea McKee's contribution in the round. She had brought Tracey Clarke forward, and she broke the false alibi on the telephone calls.

In our view, the DPP came to a somewhat hasty decision in deciding that Andrea McKee's credibility came into question as a result of her 'Pendine excuses' for not attending the committal hearing, especially as later evidence emerged which suggested that there was some truth in what she had said about her son's illness (5.166). We are not convinced that anyone tried to find out Andrea McKee's real reason for not attending the committal hearing, and whether her excuse was valid – instead, they tested the validity of the excuse she gave. Miss Smith's rejection of the authenticity of the threatening letter Andrea McKee received (24.8) on the ground that Andrea McKee would only consider moving to one specific area is at odds with our experience of many people who have received such letters. Recipients are frightened and want to go somewhere where they feel safe. In our view, the LVF were very likely not to have wanted the trial to go ahead, and the kind of threats they made were typical of such letters. Eight fingerprints were found on the letter, and four on the envelope (59905). DCI K did say (p66 of his evidence) that some fingerprints on the letter had still not been identified. The DPP had refused to deschedule the charges against the alleged perpetrators in the collapsed murder trial, so he was well aware that the case had paramilitary overtones.

RC Atkinson was, of course, used as a prosecution witness himself by the DPP against Marc Hobson in the murder trial. We find it difficult to understand why, knowing that he was under investigation for colluding with a suspect; RC Atkinson was thought by the DPP to be a more credible witness than Andrea McKee. Indeed, we find it hard to discern any consistent criteria for assessing credibility as applied by the DPP. RC Atkinson's own credibility would have been brought into question if Andrea McKee had been successfully used as a prosecution witness against him. We also believe that it is highly unlikely that such an outcome would not have crossed the minds of members of the ODPP as posing an embarrassing situation, as Ivor Morrison commented asserted (please see 24.49 below). In our reluctant opinion, RC Atkinson emerges from the Inquiry as so tainted a witness that the safety of Marc Hobson's conviction must now be in question.

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

See comments relating to the DPP in Section 8

Comment

6 The Panel will determine whether, on the totality of that evidence, the ODPP was responsible for acts or omissions which brought it within the terms of reference. It may be convenient to consider its behaviour before and after delivery of crime files.

Please insert any submissions or comments if you so wish

7 Prior to the delivery of crime files the ODPP had the power to direct or to advise on investigations. Where suspects were in custody, that power became somewhat elided with the duty of the ODPP to inform itself of matters which went to the question whether further remands should be sought. The evidence suggests that the power was not exercised.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

.Despite the fact that it was widely reported in the media that Robert Hamill was fighting for his life, there appears to be no evidence that the DPP took any interest in the GBH investigation, and only began to see the assault as a serious crime after Robert Hamill died, their first recorded meeting having taken place on 12th May 1997 (4.1).

The first Interim Directive was issued by the DPP on 12th August 1997 (4.17), after the RUC crime file was received on 30th July 1997 (4.12)

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions state:

> *"Prior to the delivery of the crime files the ODPP had the power to direct or to advise on investigations. Where suspects were in custody, that power became somewhat elided with the duty of the ODPP to inform itself of matters which went to the question whether further remands should be sought. The evidence suggests that power was not exercised."* (§7, above)

2. The Submissions go on in subsequent sections to note a number of specific incidents in relation to which it is alleged that there were failures of the type set out in §7. The PPS addresses those criticisms individually as they arise, but considers it necessary at this juncture to set out the interrelation between the Police and the ODPP as a matter of general principle and practice.

3. There are two distinct time frames which must be considered: (1) before the submission of a police investigation file and (2) after that file has been received by the ODPP. (1) is addressed immediately below; (2) is addressed in response to §8 in this Part.

Prior to receipt of the police investigation file

4. The overarching principle is that investigation is a matter for the Police, and prosecution is a matter for the ODPP (see, for example, W/S of Sir Alasdair Fraser, [82033], §5; evidence of Raymond Kitson, 15.9.09, Day 63, pp29-30). The ODPP could direct that a matter which was not currently the subject of a police investigation should be investigated, under the power set out in the Prosecution of Offences (Northern Ireland) Order 1972, Article 6(3), which provides:

> *"It shall be the duty of the Chief Constable, from time to time, to furnish to the Director facts and information with respect to -*
>
> > *(a) indictable offences alleged to have been committed against the law of Northern Ireland;*
> >
> > *(b) such other alleged offences as the Director may specify;*
>
> *and at the request of the Director, to ascertain and furnish to the Director information regarding any matter which may appear to the Director to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the Director to be necessary for the discharge of his functions under this Order."*

5. Where however a police investigation is already underway, Article 6(3) has no role to play. Moreover, deciding on specific lines of inquiry to be pursued, was, prior to the submission of a police file to the ODPP, a matter primarily the responsibility of the Police. Whilst occasions might arise in which it became necessary or appropriate to give prosecutorial advice (i.e. advice on matters relevant to the prospects of a securing a successful conviction) prior to the submission of a police file, such occasions would be rare, and would arise only where police sought specific advice or where, during the course of a consultation on matters such as bail, a very obvious line of inquiry needed to be pursued for prosecutorial purposes (such as the propriety of seeking a remand in custody).

6. Accordingly, prior to the receipt of a police investigation file, the role of the ODPP was essentially limited to providing advice on matters relating to the prosecution, as opposed to matters concerning the investigation:

> (a) The Director explained the relationship between the Police and the ODPP in these terms: *"In respect of cases reportable by the Chief Constable to the Director it is the function of the Chief Constable and members of the police force to investigate alleged or suspected offences and to furnish relevant facts and information to the Director. It is the function of the Director with a view to the initiation or*

continuation of criminal proceedings, to consider the facts and information brought to his notice by the Chief Constable, and where the Director thinks proper to initiate, undertake and carry on criminal proceedings. The broad and important principle is that investigation is for the Chief Constable, not for the Director … [T]he Director cannot control the manner in which an investigation is conducted by the Police." (W/S of Sir Alasdair Fraser, [82033], §5)

(b) The former Chief Constable, Sir Ronnie Flanagan, confirmed his understanding of this division of functions. In his oral testimony he emphasised that *"the Police would be responsible for all operational decisions within an investigation"*. (10.9.09, Day 61, p269). He explained the position in these terms: *"I have to say, Chairman, the Director would be absolutely circumspect in the professional role of Director of Public Prosecutions and would always have made it clear that it was for the Police to gather evidence and to present to the Director and his staff for consideration, that it wasn't the role of the Director or his staff to gather evidence. You know, there is a careful relationship between a Chief Constable and, in our case in Northern Ireland, the then Director of Public Prosecutions. I think we both understood and respected the professional distance that was required."* (p266)

(c) As former Assistant Chief Constable Raymond White put it, meetings between the ODPP and the Police prior to the submission of the file were not *"for the purpose of the Director or any of the staff directing what nature of enquiries or investigation we should conduct. It would simply have been to satisfy ourselves as regards the legal requirements in terms of the weight of evidence and whatever else we were seeking. So there was a clear firewall, if I can put it that way, between what you could approach the Director on and what, as it were, we had to handle for ourselves."* He went on to confirm that *"the day-to-day conduct of an investigation"* was not a matter on which the Police would seek direction of the ODPP (20.5.09, Day 52, pp103-105).

7. This division of functions is a long-standing and central tenet of the relationship between the Police and the ODPP. In 1978, the Director (xxxxxxxx) wrote to the Assistant Chief Constable (Crime) of the RUC in the following terms:

"It is clearly in the interests of everyone, but particularly police and the prosecuting authority, that investigations which are undertaken by the police should be directed towards relevant issues and matters. Accordingly, if there is any doubt as to what issues and matters are the relevant ones, then police should, at or near the outset of their investigations, consult with the Director's office. Consultations with the Director's office should therefore be arranged at an early stage in any case in which the issues are not clear or there is any room for

substantial doubt as to the course which the investigation ought to pursue." ([75373]).

8. The Police may, therefore, approach the ODPP for advice at an early stage on any legal issues which have arisen during the course of the investigation, and the ODPP may similarly approach the Police if it requires information at that stage in order to carry out its own functions. The meeting between the ODPP and the Police on 13 May 1997 is an example of this situation. At that time, the murder suspects were all held on remand in custody. A bail hearing was likely to arise shortly and the ODPP needed to know the position in relation to the investigation. In particular, it had to have some gauge of the strength of the case against the suspects, this being an important consideration for any court when determining whether or not to remand persons in custody. As Mr Kitson explained, it was for that reason that clarification on the cause of death was sought from the Pathologist Dr Crane, via the Police. If it had transpired that there was no causal link between the assault and the death, it would plainly have been inappropriate for the ODPP to have sought further remands on charges of murder.

9. The PPS accepts that when advising the police in the manners described above, it is bound to act with due diligence, and, it is submitted, the evidence clearly demonstrates that it did so in relation to the Robert Hamill case.

8 The position after the delivery of crime files was that the ODPP gave directions about the conduct of the prosecutions. The Panel may wish to consider whether directions, or the absence of directions, had the ability to shape the investigation. If so, it is necessary to consider whether they did so in relation to individual suspects, and whether the directions or the absence of them were attended with due diligence. What follows is the analysis of the evidence in relation to each suspect.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

In our opinion, the DPP made a catastrophic mistake, falling straight into the trap set for him by DCS McBurney, in considering the murder investigation and the complaint investigation separately, and then dividing the complaint issue into two separate trials. Had he waited until he had received all the relevant evidence, he would have been in a position to be far more interventionist in the making of directions, and he would not have overlooked the crime of Thomas Hanvey, who provided a false alibi for RC Atkinson. He would almost certainly have treated Andrea McKee in a way which would have secured her full co-operation. Diane Hamill, who could not have known the wealth of information the Inquiry has unearthed, was of the view that the DPP was hastening to drop charges (5.35). Some witnesses have sought to portray her as an anti-establishment figure who was out to defame the RUC. Elsewhere we have argued that that was not a fair or accurate picture, and we hope that the Panel will not attribute her misgivings about the DPP's action to

any false interpretation of her standpoint, which was merely that of a victim seeking justice for her brother. We fear that the evidence bears out her misgivings about the role of the DPP, and we wonder if the clue to the DPP's actions can be found in the highly unusual and political advice the DPP gave to the Attorney General, set out at paragraph 4.177.

Submissions by the Public Prosecution Service

After receipt of the police investigation file

1. Subsequent to receipt of the police investigation file, it is the duty of the ODPP to reach decisions on whether or not to prosecute the suspects and if so for what offence(s). If, in the course of that decision-making process, it becomes apparent that there is further information required in order to make an informed decision, then the ODPP can and should direct the Police to carry out those investigations through the use of an interim direction. As Mr Kitson explained in his second statement to Inquiry:

> *"Once a crime file was submitted, the DPP lawyer dealing with the case would consider whether there was sufficient evidence to allow an informed decision as to prosecution to be taken. If not, the lawyer would consider whether any additional evidence was necessary before a fully informed decision as to prosecution could be taken. If so, the lawyer responsible would issue an interim direction to the police requesting for example, the expedition of a pathologists' report. In certain cases, such as the Robert Hamill murder prosecution, the file would have been submitted by investigating police to the RUC Crime Department to be considered by a senior RUC officer of the rank of Superintendent or above before being submitted to the ODPP. That ensured that cases of complexity went through a stage independent of investigating police and enabled the office of the Chief Constable to identify any additional lines of enquiry and/or to express an opinion on the recommendations of the investigating officers. In such a case, any interim direction would be issued to the officer of the Chief Constable (Crime Department) to keep them informed of the progress of the prosecution, with a copy faxed to the investigating officer to enable him to expedite the additional matters required."* (2nd W/S of Raymond Kitson, [82085], §§5-6)

2. If, upon a consideration of all relevant evidence, the ODPP concludes that the test for prosecution is or is not met then this is reflected in a direction to prosecute or not to prosecute. Inquiry Counsel's Submissions address certain specific issues in relation to the decisions not to prosecute Bridgett or Lunt to which the PPS responds below, under §§9-10 of Inquiry Counsel's Closing Submissions, Part 18.

3. No specific comment or criticism has been addressed by Inquiry Counsel to the decisions not to proceed with murder prosecutions against Forbes, Hanvey or Robinson, taken by Raymond Kitson on 29 October 1997

([10620]/[18347]). For completeness, the PPS makes the following short observations:

a. The cases against Forbes and Hanvey were predicated solely on the evidence of Tracey Clarke and Timothy Jameson. Without those witnesses there was no evidence which could implicate them in the murder of Robert Hamill (W/S of Raymond Kitson, [82092]-[82095], §§28-37).

b. Tracey Clarke and Timothy Jameson were again the principal witnesses against Robinson. Whilst there was some further evidence implicating him in disorderly conduct, there was nothing to support the allegation that he was directly involved in the attack on Robert Hamill (W/S of Raymond Kitson, [82092]-[82095], §§28-37).

c. As the Director explained in his letter xxxxxx of 10 December 1997:

> *"In the absence of evidence from Witnesses A and B, and without sufficient other evidence being available, it was concluded that there was no reasonable prospect of obtaining a conviction of Forbes, Hanvey and Robinson for any offence relating to the death of Robert Hamill. Accordingly, on 29 October 1997, a direction issue for no prosecution of these persons for the murder of Robert Hamill. The holding charge (of murder) was withdrawn at the first available court at Lisburn on 31 October 1997."*

d. The decisions not to prosecute Forbes, Hanvey and Robinson were all subsequently reviewed and found to be correct by:

i. xxxxxxxx, in his 13 August 1999 report ([18321]; see also W/S of Raymond Kitson, [82113], at §88);

ii. David Perry QC in his First Advice ([82136]-[82180], at 9.2-9.20; see also W/S of Raymond Kitson, [82113], at §89).

9 Stacey Bridgett

9.1 The first question is whether the ODPP should have directed the RUC to reinterview him once it knew his blood had got onto Robert Hamill's jeans in a way that was consistent with him standing over Mr Hamill's prone body?

9.2 The second question is whether, in the light of Crown Counsel's view that the blood spatter was likely to be determinative of a decision to prosecute and the information given by Lawrence Marshall on that question, the ODPP adequately informed itself prior to directing no prosecution? If it did not, was that a want of due diligence within the terms of reference?

9.3 The third question is whether the evidence of what was said at the scene regarding "Stacey" should have been treated differently.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We consider that the DPP should have directed the RUC to re-interview Stacey Bridgett and put the forensic evidence to him before dropping the charges against him. Once the charges were dropped, the DPP should have considered whether his lies about his proximity to Robert Hamill (please see module 12, paragraph 58.7) amounted to an attempt to pervert the course of justice.

In view of Lawrence Marshall's statement that he was unable to furnish any further opinion on the mechanism for staining (11.1), we think it would have been sensible of the DPP to seek a second opinion, and particularly to see whether the size of the blood stain indicated exactly (or, for that matter, approximately) how close Stacey Bridgett had been to Robert Hamill. If it was likely to have been inches rather than feet, then that would have strengthened the possibility that he took part in the attack.

The Panel may wish to consider whether the ODPP failed to give adequate consideration to the evidence of RC Silcock. We submit that further directions should have been made to seek corroboration of the hearsay evidence provided by this officer, given the fact that the forensic examination of Stacey Bridgett's blood splatter was inconclusive and he did not make admissions during interview.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions raise three distinct issues in relation to the decision not to prosecute Bridgett for murder (§§9.1-9.3, above):

a. Whether the ODPP should have directed that he be re-interviewed in relation to the forensic evidence;

b. Whether the ODPP adequately informed itself in relation to the blood stain evidence;

c. Whether the evidence of R/Con Silcock should properly have been treated as admissible *res gestae* evidence.

2. The PPS does not accept that there was any lack of due diligence in its decision-making on these issues, for the reasons set out later in this Part. Before addressing the substance of the decisions, however, the PPS makes the following short observations on the Terms of Reference in so far as they apply to this area of decision-making:

a. The PPS accepts that the questions of re-interviewing Bridgett and ensuring that it had all relevant information in relation to the blood stain evidence are within the Terms of Reference, in so far as they form part of the investigative process leading up to the decision not to prosecute.

b. The PPS does not accept that the Terms of Reference require the Panel to determine whether the evidence of R/Con Silcock should properly have been treated as *res gestae* evidence is within the Terms of Reference. The PPS does not consider this decision to have shaped the investigation into Robert Hamill's death. The suggestion that R/Con Silcock be re-interviewed does not alter that position: the question was purely one of legal principle, not investigative processes.

c. It has not been suggested in Inquiry Counsel's Closing Submissions that the correctness of the final decision not to prosecute Bridgett is capable of falling within the Terms of Reference. The PPS submits that, for the reasons set out above, the correctness of this decision falls outside the scope of the Terms of Reference, it not being suggested that it was a decision which shaped the investigation into Robert Hamill's death.

10 Material

10.1 7/5/97 The FSANI form was sent by DC Donald Keys to test items of clothing believed to have been worn by Stacey Bridgett, including cream jeans which were recorded as blood stained. (8181).

10.2 9/6/97 DC John McDowell spoke to Lawrence Marshall who told him that Stacey Bridgett's blood was on Robert Hamill's jeans. A report from Lawrence Marshall was expected later that week. (NB No report was sent until 24/10/97) (3743).

10.3 21/7/97 DI Irwin wrote a crime report into the murder. The report indicated that DNA samples had been taken from Dean Forbes, Stacey Bridgett, Rory Robinson and Kyle Woods (not Allister Hanvey, Marc Hobson, Wayne Lunt or Andrew Allen) (NB If the forensic report had been completed in time, it would not have been able to include these samples) (6080) The report noted an oral indication from Lawrence Marshall, FSANI, that a blood stain on Robert Hamill's clothing was from Stacey Bridgett. (6132)

10.4 1/8/97 Richard Monteith, solicitor, wrote to the ODPP requesting early sight of forensic and post-mortem reports. In manuscript at the bottom of letter a draft reply is noted that the file had not reached the ODPP offices. (28477)

10.5 12/8/97 The ODPP Interim Direction Part I was issued. It was noted that forensic evidence (body fluids and physical methods) and the post-mortem

were still outstanding. The direction was that no prosecution decision was to be made prior to receipt. (18106)

10.6 24/10/97 The ODPP received Lawrence Marshall's report (see 24 October 1997) on items of clothing attributed to Hamill. Robert Hamill's black leather jacket had extensive blood staining on the back with blood stains on the back right sleeve, right front and side. His jeans were bloodstained at the bottom of both legs, with staining more heavily on the left and with light stains on the seat. On the white shirt there were bloodstains on the collar and over the right shoulder at the back. It showed that unsuccessful DNA testing had been carried out on Robert Hamill's jacket, the seat of his trousers, right shoe and the right cuff of Maureen McCoy's jacket. Successful tests showed Stacey Bridgett's blood on his own clothes and the right leg of Robert Hamill's jeans, blood from unknown A on Robert Hamill's clothes and on Maureen McCoy's jacket collar, and blood from an unknown person B on D's top. (17797)

10.7 28/10/97 DI Michael Irwin wished the ODPP to consider the forensic evidence regarding Stacey Bridgett. (18342)

10.8 28/10/97 A decision on Stacey Bridgett had to await Counsel's advice but Raymond Kitson's view was that the forensic evidence was not sufficient to support proceedings against Stacey Bridgett. (18346)

10.9 29/10/97 The ODPP issued a Direction Part 1 which stated that in the light of what occurred at the consultation with Tracey Clarke and Timothy Jameson, evidence from those witnesses would not now be available for any prosecution. A direction for Stacey Bridgett would pend Senior Counsel's Advices but "final decision may also have to await consideration of the post-mortem report". (10620)

10.10 4/11/97 A file note was made by Raymond Kitson after new information had come into the ODPP's possession regarding Colin Prunty's identification of a defendant. In relation to Stacey Bridgett, it was recorded that Counsel's Advice had not yet been received. (18032)

10.11 12/11/97 A HOLMES action was raised on 12 November 1997 relating to DI Michael Irwin having spoken to Lawrence Marshall about the latter's report. As a result of that conversation, Lawrence Marshall tested unknown A against the DNA of Marc Hobson, Andrew Allen, and Wayne Lunt with negative result. Colin Prunty and Maureen McCoy said it was not their blood. (17797)

10.12 13/11/97 Gordon Kerr QC analysed the evidence against Stacey Bridgett amongst others. The case against Bridgett was difficult and required further information as to the blood staining. (17633)

10.13 13/11/97 Raymond Kitson of the ODPP briefed the Director on Senior Counsel's advice in particular that Counsel had advised further inquiries should be made on, amongst others, Stacey Bridgett. (18035)

10.14 17/11/97 A file note was made by Roger Davison, ODPP, that he had discussed the evidence of Stacey Bridgett's blood on Robert Hamill's clothes (on the right leg of his jeans) with Lawrence Marshall, FSANI. One small spot of blood the size of a penny coin was found. The blood on the left trouser leg was smeared and did not come from Stacey Bridgett. Lawrence Marshall said the fact that the spot was not an elongated shape, meant that there was nothing to indicate what direction the blood came from and he was reluctant to offer any interpretation as to how the blood got there but said it was consistent with Robert Hamill lying on the ground and a drop of Stacey Bridgett's blood falling as he stood over him. (18040)

10.15 18/11/97 Roger Davison, Mr Kitson and Mr Kerr QC met to discuss the case against Bridgett and Wayne Lunt. Forensic evidence in relation to Stacey Bridgett was discussed and it was indicated that Roger Davison had spoken to Lawrence Marshall. Gordon Kerr QC advised that this evidence was insufficient as all it proved was that Stacey Bridgett had been close enough to Robert Hamill to drip blood on him, but there was no evidence as to what he had done. Further, the lie during interview, that he had not been close to Robert Hamill, was not sufficient to inculpate him. Gordon Kerr QC advised that there was no reasonable prospect of convicting either. The ODPP directed that charges be withdrawn against Wayne Lunt and Stacey Bridgett as the spot of blood proved no more than Bridgett had been close enough at some stage so that blood had dropped on Robert Hamill. At interview, Stacey Bridgett had denied being near Robert Hamill. However this denial, taken with the forensic evidence, was not sufficient to provide a reasonable prospect of his conviction for an offence relating to the death of Robert Hamill. (18041)

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see section 9.3 above.

11 Witnesses

Lawrence Marshall

Statement

11.1 Para: He spoke to the ODPP's representative on 17th November 1997 about being unable to give any further opinion on the mechanism for staining.

Michael Irwin

Oral Evidence

11.2 Following the information about Mr Bridgett's blood, it was decided by DI Irwin, DCI P39 and DCS McBurney that they had no power to get Mr Bridgett back into police custody. As he was a charged prisoner, he had to be dealt with under the Magistrates Courts (Northern Ireland) Order and Article 47(4)(e) stated the only reason to get a charged person back into custody, was

to interview him about other offences (p13). They could have gone to the prison but Mr Bridgett did not have to see them and he would have had a solicitor present. He would have had to be cautioned. Consideration was not given to seeing Mr Bridgett as the forensic examination was still ongoing. Consideration was not given to it in October as they knew from other witnesses that Mr Bridgett was in the vicinity of Mr Hamill (p15).

11.3 DI Irwin stated that the police would have discussed the decision about re-interviewing Mr Bridgett with the ODPP. DI Irwin believed in normal circumstances the decision not to re-interview Mr Bridgett should have been recorded as a policy decision (p18). He was not aware of the entries in the policy file until he was given it on the 30th May. That there was a delay in the forensic report was flagged in the ODPP file and the police would have chased it up, as would have the ODPP (p19). It was acknowledged at that time that forensics were late with their reports due to overwork (p20). There was no adverse inference to be drawn from no comment answers at that time. DI Irwin did not believe that Mr Bridgett's attitude would have changed to answering questions after being in prison; therefore a re-interview would have been pointless (p23).

11.4 DI Irwin did not consider getting another forensic scientist to look at the blood drop as it was a matter for Mr Davison (p27).

11.5 The decision to re-interview Mr Bridgett was exclusively one for the police. If they decided a further interview was required, the police would have approached the ODPP for advice (p31). DI Irwin thought that they discussed Mr Bridgett's position that he was telling lies with Mr Kitson or Mr Davison at about the time the decision was made to withdraw the charges (p32). The specific issue of re-interview was not discussed; it was whether the fact that Mr Bridgett had told lies could be used (p33).

Roger Davison

Statement

11.6 Para 13: The correct procedure after hearing about Mr Bridgett's blood from Mr Marshall would have been to speak to the SIO and ask him to request further statements dealing with that information.

11.7 Para 32: He was shown Mr Kitson's file note dated 20th November 1997 (18041) which recorded a consultation between him, Mr Kitson and Mr Kerr. It concluded that there was no reasonable prospect of conviction against Mr Lunt or Mr Bridgett. The note discounted Mr Bridgett's blood being on Mr Hamill's jeans as it was insufficient to prove he had been involved in the commission of an offence.

Oral Evidence

11.8 Per para 13, regarding Mr Bridgett's blood being on Mr Hamill, if Mr Davison had wanted a statement, he would have asked Mr Bridgett for one, or asked

the police to get it. It may have been sufficient to have a note of what he would say (p7).

Gordon Kerr QC

Oral Evidence

11.9 The Bridgett blood spot on Mr Hamill showed that Mr Bridgett's account was false. Under PACE, it was exceptional that the police could reinterview a suspect. Neither he nor the ODPP asked for further interviews as the forensic scientist could not provide much more information (p85)

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

We agree with Mr Kerr Q.C.'s evidence

Comment

12 The evidence about the potential for a re-interview suggests that it would have been lawful. The issue the Panel may need to determine is whether the potential value of it was such that a reasonable prosecutor was bound to inform himself of the outcome of such an interview before deciding whether to direct a prosecution for murder. If he was, then it appears to follow that the failure to do so shaped the investigation.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We think that it was within the margin of appreciation afforded by the DPP's discretion to decide not to put Stacey Bridgett on notice of the existence of the blood stain and give him an opportunity to come up with an exculpatory story (although it is our understanding that it would have had to have been disclosed to the defence eventually). However, when the DPP was deciding whether to drop the charges against Bridgett, then he ought to have considered re-interviewing him about the bloodstain.

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

Whilst a re-interview may have been lawful, would it have been a wise tactic in that it gave Bridgett an opportunity to come up with an innocent explanation.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions state:

"The evidence about the potential for a re-interview suggests that it would have been lawful. The issue the panel may need to determine is whether the potential value of it was such that a reasonable prosecutor was bound to inform himself of the outcome of such an interview before deciding whether to direct a prosecution for murder." (§12, above)

2. Essentially, it is suggested that the ODPP should have directed the Police to re-interview Bridgett in light of the evidence that his blood was on Robert Hamill's clothing, which contradicted his previous account in interview. The suggestion was made during the course of DI Irwin's evidence that this re-interview could have taken place either upon notification from Mr Marshall that Bridgett's blood had been found on Mr Hamill's clothing on 12 May 1997 or upon receipt of the forensic report in October 1997. The PPS makes the following observations:

a. On 12 May 1997 the ODPP was made aware that the blood of Bridgett had been found on Mr Hamill's jeans ([31613]). At that stage, the Police investigation was ongoing and it was a question of judgment for the Police as to whether or not to put that matter to Bridgett in a re-interview at that stage (2nd W/S of Raymond Kitson, [82103], §58; evidence of Mr Kerr QC, 16.9.09, Day 64, p71). The Police, not the ODPP, had a full oversight of the evidence at that juncture, no murder investigation file having yet been submitted.

b. The ODPP received Mr Marshall's report on 4 November 1997 confirming that a spot of Bridgett's blood had been found on the lower right leg of Mr Hamill's jeans ([17797]). Bridgett had stated repeatedly in interview that he had not even seen two men on the ground, let alone been anywhere near them (Interview of Bridgett, 6.6.97, 14.27, DGK/3, pp25, 28; Interview of Bridgett, 10.5.97, 15.05, EW/3, p11). As Mr Kitson explained in his second statement *"From the Prosecution's point of view, we already had a proven lie. That was as good as the evidence was likely to get. There would be nothing to gain by affording Bridgett an opportunity to seek to explain the bloodstain away, and there was no reason to suppose that a further interview would result in a confession to murder. A tactical question of this nature is essentially a matter of judgment, but my own view is that a further interview would have been more likely to weaken the Prosecution case than to strengthen it. There was no reasonable expectation that a further interview would provide any evidence on which to prosecute Bridgett"* (2nd W/S of Raymond Kitson, [82103], §58; see also, Mr Kitson's evidence to the Inquiry, 15.9.09, Day 63, p72). That was a view shared by Mr Kerr QC, who confirmed that had he seen any evidential benefit in a re-interview he would have advised that one take place (16.9.09, Day 64, pp128-9). It was also a view shared by DI Irwin (9.9.09, Day 60, p22).

c. The decision not to prosecute Bridgett for murder was taken on the express basis that the forensic evidence established that he had lied

in interview and that he had been sufficiently close to Mr Hamill for a drop of his blood to land on his lower right leg ([18041]-[18042]). However, as Mr Kerr QC noted, that (and the other evidence against Bridgett) fell a long way short of providing a reasonable prospect of conviction for murder.

3. It was both Mr Kitson and Mr Kerr QC's view that the Prosecution case was more likely to be weakened than strengthened by a re-interview, in which Bridgett would have the opportunity to give an innocent explanation for the forensic evidence. In those circumstances, there can be no warrant for the suggestion that a reasonable prosecutor would have been bound to inform itself of the outcome of a re-interview before taking the final decision on the case. In fact, the evidence would suggest quite the opposite: the reasonable prosecutor would have concluded that there was nothing to gain, and much to lose, by conducting a re-interview.

4. This view was endorsed by David Perry QC, in his third advice:

> *"In summary, re-interviewing a person after charge is unusual, and to have re-interviewed Bridgett in these circumstances would have been highly unusual. It may have been possible to justify such a course by reference to the terms of the Codes of Practice. However, the material point is that, from the point of view of a prosecutor, there was simply nothing to be gained by re-interviewing Bridgett. As things stood, the scientific evidence appeared to demonstrate that he had given an untruthful account. It is difficult to see how re-interviewing Bridgett the prosecution would have obtained any further evidence against him. To the contrary, it would have given him the opportunity to explain away his earlier answers, thereby weakening the prosecution case further. In short, it is likely that it would have done more harm than good."* ([82209]-[82219], §4.3)

13 The issue about the blood spatter is similar. The evidence from the ODPP witnesses was to the effect that Mr Marshall could be, and was, relied upon to say whether any further tests or better expertise were called for. The Panel may wish to consider whether a reasonable prosecutor could have left the matter there before deciding whether to direct a prosecution for murder. If he could not, then it appears to follow that leaving the matter there shaped the investigation.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

The Panel may wish to consider why the DPP did not consider it necessary to obtain a second forensic opinion. The instruction of another forensic expert may have assisted in determining Stacey Bridgett's involvement in the attack. Any new information that may have been provided could then have been put to Mr Bridgett in further interview.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions raise the following issues:

> *"…whether, in light of Crown Counsel's view that the blood spatter was likely to be determinative of a decision to prosecute and the information given by Lawrence Marshall on that question, the ODPP adequately informed itself prior to directing no prosecution? If it did not, was that a want of due diligence within the Terms of Reference?"* (§9.2, above)

> *"The evidence from the ODPP witnesses was to the effect that Mr Marshall could be, and was, relied upon to say whether any further tests or better expertise were called for. The Panel may wish to consider whether a reasonable prosecutor could have left the matter there before deciding whether to direct a prosecution for murder."* (§13, above)

2. The suggestion appears to be two-fold:

a. That the ODPP should not have relied upon Mr Marshall's own decision as to whether or not further tests should have been carried out (presumably on the unidentified blood stains), but should instead have directed them itself;

b. That the ODPP should not have relied upon Mr Marshall to give an opinion on blood pattern analysis, but (presumably) should instead have instructed a separate expert on this point.

3. The PPS does not accept either of these criticisms. The relevant sequence of events was as follows:

a. On 4 November 1997 the ODPP received the report of Lawrence Marshall of FSANI. The report confirmed that blood on the right leg of Mr Hamill's was a 1:7,300 match with that of Bridgett ([17797]). There was nothing on the face of the report to indicate that there were additional blood stains which had not been tested (Evidence of Lawrence Marshall, 13.5.09, Day 48, p35).

b. On 13 November 1997 Gordon Kerr QC advised in the following terms ([17640]):

> *"Forensic evidence is available and shows that blood coming from him was found on a sample taken from the right leg of Hamill's jeans. No blood from Hamill was found on his clothing although his own blood was, this despite the fact his clothes were not seized until the 6th May.*
>
> *This is a difficult case. Were it to be alleged by a witness that Bridgett had been seen assaulting Hamill the blood evidence*

would be strong confirmatory evidence. As it stands this coupled with the police sightings of him at the front of the crowd confirm that his account to the police was not truthful. It shows that he was close enough whilst bleeding to have dripped some blood onto the deceased or that his blood spattered over to Mr Hamill. I do not think the position is presently clear enough and would like further information as to the type of stain and its extent before deciding whether this would be strong enough to be probative of contact."

Mr Kitson directed Mr Davison to make the further inquiries set out by Mr Kerr QC ([18035]).

c. On 17 November 1997 Mr Davison spoke to Lawrence Marshall. Mr Davison's note records ([18040]):

"I spoke by phone with Lawrence Marshall this morning at around 11.30am. He informed me as follows. A small spot of blood (identified as Bridgett's blood) was found on Hamill's trouser leg 1 or 2 inches about the bottom of the hem. It was a round spot no bigger than a one pence coin. There was one other spot of blood near to this spot but it was not tested. The blood on the left trouser leg did not come from Bridgett and was smeared and thus different from Bridgett's spot. The fact that the blood was not in an elongated shape means that there is nothing to indicate what direction the blood came from.

Mr Marshall was reluctant to offer any interpretation as to how the blood got there but said it was consistent with Hamill lying on the ground and a drop of Bridgett's blood falling as he stood over Hamill. I phoned Crumlin Road to speak to Gordon Kerr at 12.20pm after speaking to Mr Kitson. He was not available but phoned me back at around 2.00pm. I briefly outlined what Mr Marshall had said to me. He said he would consider the matter and meet me tomorrow 18 November 1997 at 10.00 am to discuss the evidence."

Mr Marshall explained in evidence that it was unusual to get a telephone call directly from the ODPP: it would only happen once or twice a year and would be for elaboration or clarification of something in a statement (13.5.09, Day 48, p12). FSANI would usually liaise with the Police, rather than the ODPP (13.5.09, Day 48, at, for example, p10).

d. On 18 November 1997, Mr Kerr QC, Mr Kitson and Mr Davison met to consider, amongst others, the case against Bridgett. Mr Kitson's second statement to the Inquiry records ([82102], §§54-55):

"The case against Bridgett was considered in the consultation with Mr Kerr QC on 18th November [18041 and 18038]. Mr

Kerr's view was that the evidence was not sufficient to sustain a conviction of Bridgett for murder. The most that could be proved was that at some stage Bridgett was sufficiently close to Robert Hamill that his blood had dropped directly onto Mr Hamill's jeans. There was no evidence to show what Bridgett was doing at the time, or what he had done prior to that point. In Mr Kerr's opinion, the fact that Bridgett had lied in interview was not sufficient to prove that he was guilty. Given that he was being interviewed for murder, Mr Kerr considered that it was not surprising that he should distance himself, even if innocent.

I agreed with Mr Kerr's view. The evidence was capable of proving that Bridgett was in and around the scene at the time, but from that evidence we could not prove exactly when, and we could not prove exactly what he did. The forensic evidence fell short of proving actual physical contact."

4. Mr Kitson went on to address the suggestion that further forensic tests should have been carried out on Mr Hamill's jeans:

"I have been asked whether consideration was given to seeking further and more detailed forensic tests on Mr Hamill's jeans. This is, in essence, a matter for the police and FSANI. If it had been obvious that further testing was necessary then it would have been open to the ODPP to request that further tests be carried out. It did not, however, occur to me, or to Mr Davison or indeed Mr Kerr that additional forensic tests would significantly affect the position. We relied on Mr Marshall to determine which areas of blood staining should be analysed. Clearly, if he had thought that further tests would prove fruitful then he would have conducted these. Mr Marshall was the leading expert in Northern Ireland at the time. If he considered that an opinion on the significance of the blood spot was beyond his expertise, or that an expert who specialised in blood pattern analysis should have been instructed, then I would have expected him to say so. He made no such suggestion. I saw no basis for the proposition that another expert should have been instructed. Mr Davison and Mr Kerr apparently took the same view. So far as I am aware, nothing has emerged since to suggest that further or better forensic evidence would have led to any different conclusion." ([82103]-[82104], §59)

5. In his evidence, Mr Kitson summarised the issue as follows:

"As far as I was concerned, the forensic scientist … realised the relevance of the questioning. He realised the reason why Davison was talking to him. He never came up with any suggestions. He was the expert in Northern Ireland in relation to blood, and if he wasn't coming up with any suggestions, I think it was reasonable for me to assume that, in fact, there was nothing going to come of that." (15.9.09, Day 63, pp74-75)

6. Mr Kitson's view is supported by the evidence of Mr Marshall, who confirmed that the question of which areas to test was a matter for him:

> *"[It] is largely left as a matter for my judgment as to which samples to take, which areas to sample. …*
>
> *When I look at a bloodstained garment, I look at the pattern of bloodstaining and form a conclusion as to whether a particular number of stains all came from -- most probably came from one source or one impact or whatever. Then I would sample those and I would try to sample the various patterns on the garment. We have to be selective because it simply comes down inevitably to the fact that we can't do everything."* (13.5.09, Day 48, pp9, 20-21)
>
> (See also the evidence of Collette Quinn to a similar effect, 13.5.09, Day 48, pp62-63 where she confirmed that it was a matter for FSANI to determine the stains which should be tested and the nature of the tests to be conducted).

7. Equally, Mr Kerr QC gave evidence in the following terms:

> *"The reality is that Mr Marshall was an experienced forensic scientist who could have, and would have, suggested if further testing would have added anything to the case. Secondly, in terms of a blood spatter expert, we are talking about one ordinary, round spot. With reality, that is not a complicated scene and any forensic scientist with experience of blood is liable to be able to say whether a conclusion can be drawn from it or not. [If he had thought the issue beyond his expertise or that a further specialism was justified] you can be sure Mr Marshall would have suggested further work should be done by someone else."* (16.9.09, Day 64, pp129-130)

8. In short, it is not for the ODPP to usurp the function and expertise of FSANI by directing which blood stains should or should not be tested. Equally, the suggestion that the ODPP should have instructed a separate expert to conduct a blood pattern analysis is without foundation. Mr Marshall made it clear in his evidence that, whilst he did not have formal training in 1997, he did have considerable experience in blood pattern analysis (13.5.09, Day 48, pp13, 51-2). He was able to explain that the blood on Mr Hamill's jeans was insufficient to enable any pattern to be discerned (even if, for example, the other untested spot had been shown to be Bridgett's) (13.5.09, Day 48, pp14-15). Equally, he was able to explain that the blood spot from Bridgett could not in itself yield any further information other than that it hit Mr Hamill's jeans perpendicularly (13.5.09, Day 48, pp18-19, 44). It has not been suggested that any other forensic expert would have reached a different conclusion.

9. There is no warrant for the criticism that the ODPP acted with anything other than due diligence in its careful consideration and handling of the

forensic evidence against Bridgett. Where clarification was required, it was sought and obtained. It is inherent in a multi-agency system that each department will be responsible for its own area of expertise and dependent on others for their expertise. The ODPP cannot perform the functions of the scientist as well as the prosecutor, and nor should it attempt to do so.

14 The evidence of Res Con Silcock was disregarded as plainly inadmissible. No thought appears to have been given to re-interviewing him, (as occurred with Con Neill) in order to clarify his evidence. The Panel may need to determine whether on the face of his statement, there plainly was evidence admissible against Bridgett under the *res gestae* rule and further consideration should have been given to the murder charge. If there was not, the Panel may need to determine whether a reasonable prosecutor was bound to direct a further interview. It seems probable that if the answer to either issue is in the affirmative then the failure shaped the investigation.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We firmly support this contention and are of the belief that too high a standard may have been set by the prosecutor with regards to RC Silcock's evidence (also refer to comments in relation to 9.3 above).

Submissions by the Public Prosecution Service

1. R/Con Silcock's statement, dated 27 April 1997, records that he arrived at the scene to find 2 males lying on the ground. One of the males was wearing a dark jacket, was unconscious and was having difficulties breathing. He went on to state:

> *"A large crowd of youths were in the vicinity of these men. They were aggressive both verbally and physically. On several occasions I pushed youths away from the injured men as they appeared to try and kick then men. One of the rowdy youths was pointed out to me by a woman wearing a white top, who alleged that this youth had jumped on the head of one of the injured men. This youth was wearing a grey charcoal top. He also had blood coming from his nose. A member of this crowd called to this person, calling him Stacey. He responded to this name."* [00700]-[00701]

2. Inquiry Counsel's Closing Submissions raise the following issues:

> *"The evidence of Res Con Silcock was disregarded as plainly inadmissible. No thought appears to have been given to re-interviewing him, (as occurred with Con Neill) in order to clarify his evidence. The Panel may need to determine whether on the face of his statement, there plainly was evidence admissible against Bridgett under the res gestae rule and further consideration should have been given to the murder charge. If there was not, the Panel may need to*

determine whether a reasonable prosecutor was bound to direct a further interview." (Part 18, §14)

3. The PPS makes four principal submissions in response:

a. The evidence of R/Con Silcock was not admissible as *res gestae*;
b. Even if technically admissible as *res gestae*, any judge would have been bound to exclude it because its probative weight was incapable of being tested in any way

c. Even if admitted, the weight to be attached to it would have been minimal;

d. There was no need to re-interview R/Con Silcock: the difficulty with his evidence was not one of clarity but one of legal principle.

4. The leading case on the admissibility of *res gestae* is ***R v Andrews (Donald)*** [1987] 1 AC 281. Lord Ackner, with whom the reminder of their Lordships concurred, summarised the position as follows (at 300-301):

"1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?
2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.
3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.
4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there

was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.
5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

5. The decision in Andrews applied the decision of the Privy Council in *Ratten v R* [1971] 1 AC 378. Two parts of Lord Wilberforce's judgment in Ratten, expressly relied upon in Andrews, are relevant to the present case:

> *"As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it."* (at 389)

Lord Wilberforce went on to consider a number of cases, foreign and domestic, noting in relation to one that there was a contrast between *"an exclamation 'forced out of a witness by the emotion generated by an event' with a subsequent narrative"* (at 390), and concluding:

> *"These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."* (at 391)

6. R/Con Silcock's evidence was that, after the attack had ceased, a female in a white top pointed to a man in the crowd and said that he had jumped on the head of one of the injured men. R/Con Silcock referred to that man as wearing a grey charcoal top and having blood coming from his nose. The officer saw this man respond to the name "Stacey" when it was called out by another member of the crowd. The important aspects for present purposes are:

> a. At the time the comment was made by the woman, the attack on Robert Hamill had ceased, albeit relatively recently;

b. The woman was and remains unidentified, such that any motive she may have had for concoction or distortion (in the context, it must be recalled, of a sectarian attack) could not be subjected to scrutiny;

c. The proximity of the woman to the incident she purported to witness was unknown, as was, for example, her level of intoxication, and thus the quality of her identification evidence was uncertain. These points go beyond the ordinary fallibility of human nature, and are special features giving rise to a real possibility of error in the identification made by the woman during the course of what was, on any view, a chaotic and volatile incident. In this context, it is pertinent to note the judgment of the Court of Appeal in *R v Turnbull* [1977] QB 224, 229, the leading case on identification evidence, where it was held that *"when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution"*. However, *"when, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."* Those comments are, of course, addressed to the situation where the identification witness could be called in evidence and cross-examined. In the present case, the essence of the issue (as raised by Mr Kitson in evidence) was that there could be no such cross-examination and therefore no testing of the quality of the purported identification (see, for example, 15.9.09, Day 63, p79).

7. In light of these factors, it is submitted that Mr Kerr QC was right to conclude that the evidence of R/Con Silcock would not be admissible at trial ([17639]). As Mr Kerr QC explained in his evidence (16.9.09, Day 64, pp74-6), the assault on Robert Hamill appeared to have ceased at the time that the comment was made such that the woman did not appear to be reacting spontaneously to something which had occurred, but was instead reporting something she had earlier seen. Moreover, the individual could not be identified and nor could their relationship to the events. Mr Kitson confirmed that he deferred to counsel on this point, given his greater experience of admissibility issues, although he also indicated that it was his view that the evidence was not within the *res gestae* category (2nd W/S of Raymond Kitson, [82104], §60; evidence of Raymond Kitson, 15.9.09, Day 63, p80). Furthermore, even if the evidence had been admissible at trial, the weight to be attached to it would clearly have been very limited for precisely the same reasons identified, above.

8. The PPS also notes that David Perry QC reviewed this issue in his First Advice, stating:

> *"It was the view of Senior Counsel that the evidence of Constable Silcock was 'clearly' not admissible against Bridgett, and while no reasons were given for this view it appears to reflect a realistic assessment of the likelihood of this evidence being used against Bridgett at any trial. The danger of admitting this evidence to the disadvantage of Bridgett is obvious and I agree with Senior Counsel's conclusion. This conclusion was accepted by the Director and it was reasonable of the Director to reach the same view."* (First Advice of David Perry QC, [82136]-[82180], §§9.25-9.26)

9. The suggestion has been made that R/Con Silcock should have been re-interviewed in order to clarify his account. No particular aspect of his account is identified as lacking in clarity and likely to be resolved by interview. The difficulty with R/Con Silcock's evidence was not that his account of the incident lack clarity, but that the nature of what had happened was such as to fall outside the scope of the *res gestae* principle. Accordingly, re-interviewing R/Con Silcock would not have improved the prospects of the evidence being admitted.

15 Wayne Lunt

15.1 The issue is whether the ODPP adequately informed itself of the evidence against Lunt prior to directing no prosecution. If not, was that a want of due diligence within the terms of reference? That evidence is not repeated here.

Please insert any submissions or comments if you so wish

Comment

16 The office of the ODPP conducted two interviews with Mr Prunty, and it showed him photographs. It demonstrated its willingness to use him as a witness by calling him at the Hobson trial. The only question is whether it should, in the face of his assertion that he had seen Forbes and not Lunt, have nonetheless decided that he would be a credible witness against Lunt.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We are of the opinion that the evidence against Wayne Lunt was not adequately considered by the DPP. In particular, it is shocking that the decision not to prosecute Mr Lunt was taken during October 1997 (4.31 - 4.33) when the DPP did not receive: 1) the post-mortem report until November 1997 (4.43) and 2) the complaint file until December 1997 (3.273). We believe that the decision not to prosecute any individual should not have been taken until the DPP was in possession of all files and therefore all facts which were related to all lines of investigation into Robert Hamill's murder. Lending support to this view is the fact that Mr Burnside received a note on the murder file (18.8) which was received in advance of the DPP's decisions not to prosecute (he confirmed in August that all of the police file except forensics

and post-mortem results were received in August 1997 – see 4.18). We invite the panel Panel to consider whether it would have been reasonable to expect a prosecutor to have postponed a decision not to prosecute suspects until the complaint file was received and considered by their office.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions state in relation to Lunt, *"The issue is whether the ODPP adequately informed itself of the evidence against Lunt prior to directing no prosecution. If not, was that a want of diligence within the Terms of Reference?"* (§15.1, above). Inquiry Counsel does not identify the basis on which it is suggested that the ODPP failed to inform itself properly of the evidence against Lunt. Any such suggestion is strongly resisted by the PPS. The evidence against Lunt was thoroughly explored and analysed by both Raymond Kitson and Gordon Kerr QC. The PPS sets out a summary of the position below.

2. At the outset, however, the PPS wishes to make brief observations as to the application of the Terms of Reference to the decision under consideration. Inquiry Counsel's Closing Submissions recognise that the relevant question under the Terms of Reference is whether the ODPP properly informed itself of the relevant factors in advance of reaching a decision. It is not suggested that the Panel can or should express a view on the merits of the decision itself. That, it is submitted, is a correct analysis of the Terms of Reference as they apply to decisions to prosecute, for the reasons set out above.

3. The case against Lunt was predicated principally on the evidence of Colin Prunty and Constable A:

   a. Mr Prunty gave a statement dated 8 May 1997 ([00513]) in which he said that he had seen a policeman take hold of one of the men who had been kicking Robert Hamill. That man was placed in the police Landrover. Mr Prunty could not identify the man, but he gave a general description of him, including that he was wearing a Rangers scarf tied up to his neck.

   b. Constable A gave a statement in which she described detaining Lunt, who was wearing a red, white and blue scarf wrapped around his face ([09235]-[09237]). She saw him initially as they arrived in the vicinity of the incident, and on a second occasion when she was returning to assist with the crowd. On that second occasion, Lunt approached her from behind and then attempted to run away before she grabbed him by the arm and took him to the Landrover.

4. On its face, the combination of this evidence presented a strong case against Lunt. As Mr Kitson explained it in his statement, there were two essential propositions:

> *"The first proposition was that the man Mr Prunty had seen kicking Robert Hamill on the ground was the same man as he later saw being taken to the police Landrover, and placed inside. This depended entirely on the evidence of Mr Prunty and on the correctness of his assertion that the two sightings were of one and the same man. Mr Prunty's account allowed for a short interval of time between his sighting of the man he saw among the crowd attacking Robert Hamill, and his sighting of the man wearing a Rangers scarf being taken hold of by police and taken away to the police Landrover. Constable A's statement made it clear that Lunt was not attacking Robert Hamill on the ground at the time she took hold of him. The Prosecution therefore needed to prove, as a first step, that Mr Prunty was reliable and correct in his evidence when he asserted that the two men were one and the same.*
>
> *The second essential proposition was that the person who had been taken to the police Landrover, detained and the released, was Wayne Lunt. This was capable of being independently proved. Constable A had detained Wayne Lunt and put him into the back of the police van. She had taken his name and address before releasing him. She could say that he was wearing a scarf matching the description of a Rangers scarf. She could also say that after releasing the man she had been approached by another man who had remonstrated with her for releasing Mr Lunt. This accorded with Mr Prunty's account of his own behaviour. Mr Lunt admitted in interview that he had been wearing a Rangers scarf and had been put in the back of the Landrover. Moreover, Mr Prunty had said during consultation that he struck the man he saw being released, and Mr Lunt had said in interview that after he had been let out of the Landrover a man had taken a swing at him. There was no evidence of any other person having been put into the police Landrover and then released."* (W/S of Raymond Kitson, [82098]-[82099], §44-45).

5. After consulting with Mr Prunty on 30 October 1997, Gordon Kerr QC advised orally that there was sufficient evidence to prosecute Lunt: the precise charge would depend on the result of the post-mortem (letter from the Director to xxxxxxx, dated 10 December 1997, [18235], §14).

6. However, having seen footage of Forbes being released from prison, it became apparent that Mr Prunty was of the view that it was Forbes, not Lunt, that he had seen assaulting Robert Hamill. Mr Kitson directed that a further statement be taken from Mr Prunty to clarify the position. Mr Prunty confirmed that the person he had seen was one of the three who had just been released from prison ([09105]). As a result of this, Mr Kitson arranged a further consultation between Mr Kerr QC and Mr Prunty, which took place on 5 November 1997. Mr Prunty said that he was nearly 100% certain that the

person he had seen was Forbes, that it was definitely not Lunt and that he would say so if asked in cross-examination. He was shown photographs of at least three individuals, including Forbes and Lunt, and the other evidence was explained to him. He maintained that it was Forbes, not Lunt, who he had seen.

7. There was a suggestion in Inquiry Counsel's mini-opening of 3 September 2009 that the ODPP may not have been acting with due diligence when it showed Mr Prunty the photographs (3.3.09, Day 56, p5). In the Closing Submissions, Part 12, §31, there is a suggestion that this step was not properly recorded and that its propriety may call for determination. The PPS rejects any suggestion of impropriety in relation to the process of showing the photographs to Prunty. It must be recalled that prior to seeing the footage of Forbes leaving prison, Mr Prunty had not been purporting to identify anyone, but merely to describe the sequence of events he had witnessed. Were a prosecution to proceed, it was recognised that the fact he had been shown photographs would have to be disclosed, but the position at the time of the second consultation was that Mr Prunty had already given a statement which would have rendered it very difficult to prosecute Lunt on the basis of his evidence in any event. Showing him the photographs was, as Mr Kerr QC described it, the *"only practical way of proceeding"*, in order to ascertain whether there was any possibility of Mr Prunty being used as a witness against Lunt (or, indeed, against Forbes) (Advice of Mr Kerr QC, [17636]; see also Mr Kerr QC's evidence to the Inquiry, 16.9.09, Day 64, pp123-126; W/S of Raymond Kitson, [82099], §46)). In the event, he maintained his second statement: the man he had seen was Forbes.

8. The development in Mr Prunty's evidence presented an insurmountable problem in prosecuting Lunt. Mr Kitson described the position as follows in his statement to the Inquiry ([82099]-[82100], §§44-47):

> *"The development in Mr Prunty's evidence did not directly affect the second proposition but in my view it fatally undermined the first. Neither Constable A, nor any other police officer, could give evidence directly implicating Lunt in the attack on Robert Hamill. In order to establish that Lunt was involved in the attack it would have been necessary to prove that Mr Prunty was correct in saying that the first man he saw (involved in the attack) was the same person as the second man he saw (being taken to the Landrover and placed inside). Mr Prunty was confident that the two were one and the same, but was now purporting to identify Dean Forbes as the man concerned. In the circumstances, Gordon Kerr and I saw no practical alternative to the showing of the photographs to clarify what he was saying.*
>
> *Once Mr Prunty had confirmed his identification of Dean Forbes, the case against Lunt became, in our joint view, untenable. Plainly, the identification of Forbes would have to be disclosed to the defence and, in fairness, would probably have to be led by the Prosecution at any committal or trial. The Prosecution would have to put Mr Prunty forward on the basis that his evidence of identification was unreliable*

and wrong insofar as he said that the man he saw was Dean Forbes (and not Wayne Lunt) but, at the same time, that he was reliable and correct when he said that the man he saw kicking Robert Hamill on the ground was the same man he later saw being taken to the police Landrover. Once it was clear that he would say in evidence that he was sure that the man he saw attacking Robert Hamill was not Wayne Lunt, it became effectively impossible to rely on his evidence to convict Lunt. In the absence of any other evidence implicating Lunt directly in the attack, the case against him was fatally flawed. I did not believe that any prosecution of Lunt would survive a committal for trial, let alone result in a conviction. This view was in accordance with the view of Gordon Kerr QC. In his written opinion received on 13th November 1998 he advised that there was no reasonable prospect of a conviction for murder [17633]. He repeated this view in a consultation on 18th November with myself and Mr Davison. The notes record that we were all agreed on this matter [18041 and 18038]. Accordingly, on 18th November I issued a direction withdrawing the prosecution of Wayne Lunt [08994]."

9. As the Chairman identified during Mr Kerr QC's evidence, *"The lacuna in the evidence was that for a time he had lost sight... That's why, in that event, his identification of the right man became important."* (16.9.09, Day 64, p127). The lacuna was apparent in Mr Prunty's evidence, both in the Hobson trial and in his evidence to the Inquiry where he clearly stated that it was after the kicking had stopped that the police came out and took the man away: see pp62, 65 and 84 of the Trial Transcript and 21.1.09, Day 6, pp118, 140, 142, 148-9. There was, in the circumstances, no way in which Mr Prunty could be presented as a reliable witness in any prosecution of Lunt. That decision was reached in the light two consultations with the witness and after careful consideration by a senior member of the ODPP and leading counsel. The suggestion that this was a decision taken without due diligence is neither explained nor supported by the evidence.

17 Marc Hobson

17.1 Was the prosecution corrupted by poor disclosure? If so, was that a want of due diligence within the terms of reference?

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We believe that the decision not to prosecute Marc Hobson should not have been taken until the DPP was in receipt of and gave consideration to the complaint file (please see our comments at 16 above).

18 Witnesses

Gordon Cooke

Oral Evidence

18.1 He was not asked to give evidence at the Hobson trial. He did not know why not (p11).

Stephen Burnside

Statement

18.2 Para 2: During 1998 and 1999 he was the Senior Legal Assistant at Belfast Crown Court. His primary role was dealing with disclosure.

18.3 Para 4: He would consult with counsel on disclosure but he took the ultimate decision as to disclosure.

18.4 Para 5: Mr Burnside dealt with all the disclosure arising out of committal in R v Hobson.

18.5 Para 15: Prior to the statements being disclosed, he would have taken advice from counsel as to whether portions should be edited out. The information removed related to persons' names. The allegation against Res Con Atkinson was disclosed.

18.6 Para 17: He was mindful of the potential risk to individual's safety, as can be seen from the editing of the statements

Oral Evidence

18.7 He was in charge of disclosure on behalf of the ODPP for the Crown Court in Belfast. The test applied was the Keane test (p142) i.e. material relevant to an issue at trial had to be disclosed or put before a judge to rule on. In a Diplock case, a disclosure judge would be appointed who would not be the trial judge (p143). Where a witness said something material in a consultation it would be disclosed as there would always be a police officer present and he would make a statement that would be disclosed (p144).

18.8 31541 would have come to Mr Burnside (p145). It was as broad as it could be (p146). Per para. 10, 80009, he could not remember if he had the full file but he was aware there was a neglect file and he had looked at it (p147). That was his normal practice but he could not specifically remember seeing the neglect file (p148). He would have been alerted to the neglect file as there was a note on the murder file that there was a related complaint file after the complaint file had been received by the ODPP. There was no system within the ODPP to alert him automatically and it might be that the officer in charge of the neglect file needed to inform him personally (p149). He was aware of the file when he was writing letters to Mr Monteith (p150).

18.9 They would have applied the test to the disclosure of the telephone records from the Atkinson's house (p151). He assumed that he would have treated the phone records in the same way as the Clarke statement and not disclosed it at

that stage, as the letter from Mr Monteith did not suggest that this was an issue that he was interested in at trial (p152). Further, it was as yet unsubstantiated (p153). Mr Burnside contained himself to issues he thought would be raised at trial (p157). He would have disclosed something he thought the defence could ask about (p159).

18.10 Mr Burnside did not see why it was inconsistent with Res Con Atkinson giving evidence that he had seen Hanvey involved because the omission was a matter for him (p154). It was possible this could be relevant to the defence. It did not appear to Mr Burnside that the defence were ignorant of the line of enquiry (p155)

18.11 The allegations he was not sure of knowing, para. 24, are those of the allegations against other officers. He knew about the Res Con Atkinson allegation (p160). He thought there might be another file (p161).

18.12 Per 31526, in October 1998 he was maintaining that the tip-off allegation had nothing to do with the trial (p162). The privileged notes were solely the notes of counsel to him as instructing solicitor (p163). He was referring to counsel's advice (p164).

18.13 Mr Burnside removed sections from para 15 of his draft statement as it was a general observation that was not directly relevant to the case. (p166)

18.14 The Atkinson allegation went to his credit and the policy for disciplinary proceedings was that it had to be carefully considered whether it could genuinely be put (p167). Until an allegation was substantiated it was not possible to say if it was of value or not (p168). It was part of the relevant consideration that Mr Kerr and Mr Davison believed Tracey Clarke was telling the truth. His considerations were:- that the defence were aware of the allegation and he wanted to make sure that the allegation was relevant to an issue at trial that would be pursued at trial (bearing in mind it was unsubstantiated), Con Neill was the main witness and that the disclosure process was ongoing. *Edwards* was the case that said disciplinary proceedings against officers that are extant should be disclosed (p169)

18.15 Mr Monteith inspected the non-sensitive documents. There was no record of Mr Burnside disclosing the telephone records (p170)

18.16 31471 showed the redacted Tracey Clarke statement. The practice was that redactions were done physically. He did not recall a discussion with counsel about disclosure of the statements. He was sure there was a not a discussion, as he did not know until being informed by the defence of the agreement to disclose (p171). The names were excluded on the grounds of personal safety. He was satisfied the defence would know whose names had been redacted (p172). Para. 17 was correct as it had become clear to him when he saw the redacted statements following the interview by the Inquiry. That was his conclusion on seeing the statements (p174).

18.17 The defence did not know that Mr Hanvey was the offender, that Ms Clarke was the source, that there were telephone records and that the prosecution considered Ms Clarke to be a witness of truth. He did not disclose those as it was clear that Mr Monteith knew the individuals involved. Otherwise he would have written back (p175). Mr Burnside said that he was not sure if he knew the civilians involved as "I'm not sure what questions were asked at the trial". Mr Burnside assumed he had talked to the police, or Mr Kerr QC or Mr McCrudden had (p176). It would be his usual practice for him or counsel to speak to the police when dealing with sensitive statements. The practice at the time was not to keep a record of consultations with counsel and police (p177)

18.18 Mr Burnside could not say if he knew if the C&D interviews had been disclosed and stated that there was no record thereon. It could have been done by Mr Davison at some stage (p179).

18.19 Mr Burnside's understanding of the relevant sections disclosed in witness A and B's statements was the alleged involvement of suspects (p180).

18.20 Mr Burnside believed that the prosecutor had a priority view on disclosure, above that of counsel, as sometimes items were indicated to be disclosed that were not e.g. for a PII hearing (p184). He believed there was case law supporting that view (p185). Mr Burnside agreed that discussions with crown counsel were ongoing on the 29th, after both prosecuting counsel had agreed to provide the statements. The discussions were about the reasons for disclosure and redactions (p186).

18.21 If Mr Monteith had asked for the names there would probably have been a PII hearing and, if disclosure had been ordered, then the options would have been to drop the case or disclose the names (p191). The defence could have written to them again if they had wanted the names in the allegations (p192).

18.22 The disclosure of the name of Atkinson was not material: the allegation was (p198).

18.23 Per para. 14 of his statement, he agreed with counsel's views as to the requirement to disclose. His earlier views were wrong as his assessment had changed on the basis of counsel' recommendations (p201). He agreed that he had been wrong as it was relevant to the witness's credibility and was therefore prima facie disclosable (p202).

18.24 Per 31475, he had made similar redactions to Witness B's statement that would have led to the identity of the statement maker (p204).

18.25 Per 18277, he saw that the defence had known that all the police officers in the Land Rover had been interviewed. He knew that only Res Con Atkinson had the allegation against him (p206).

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

See section 8 regarding submission on the DPP

Comment

19 As it transpires, Mr Davison had disclosed the transcripts of interviews conducted with Mr Atkinson in September and October 1997. Further, the application for disclosure of Tracey Clarke's statement permitted the redactions that were in fact made. It follows that the redactions were explicable and caused no harm. The Panel may think, in those circumstances, that no issue remains.

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

We agree with this

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

No issue taken

Submissions by the Public Prosecution Service

1. The following question is raised in Inquiry Counsel's Closing Submissions:

> *"Was the prosecution [of Hobson] corrupted by poor disclosure? If so, was that a want of due diligence within the Terms of Reference?"* (§17.1, above)

2. The comment states:

> *"As it transpires, Mr Davison had disclosed the transcripts of interviews conducted with Mr Atkinson in September and October 1997. Further, the application for disclosure of Tracey Clarke's statement permitted the redactions that were in fact made. It follows that the redactions were explicable and caused no harm. The Panel may think, in those circumstances, that no issue remains."* (§19, above)

3. The PPS submits that, for the reasons set out above, there is no basis on which this decision is capable of falling within the Terms of Reference. However, the PPS agrees that, on the evidence there is no potential basis for criticism in any event. The statement of Tracey Clarke was redacted solely for the purpose of protecting the identity of the statement maker, such that names, addresses and descriptions were removed. It is not correct to say that the allegation against Atkinson was itself redacted. The allegation would have remained obvious to the defence. Similar redactions were made to Timothy Jameson's statement for precisely the same reason (namely to protect the identity of the statement maker).

4. The PPS also notes that it was suggested in the opening by Inquiry Counsel that embarrassment over the alleged failure in disclosure when calling

Atkinson as a witness in the Hobson trial was a possible ulterior motive for discontinuing the subsequent prosecution of Atkinson and others (see also, the questioning of Ivor Morrison, 17.9.09, Day 65, pp50-2). That very serious allegation is, on the evidence, entirely without foundation.

5. The position on the evidence in outline is as follows:

a. Hobson's defence team were fully aware of the allegations against R/Con Atkinson, having received copies of the interviews conducted within him in September and October 1997 (Letter from Mr Davison to Mr Monteith, dated 7 April 1998, [75382]-[75383]). Mr Davison's letter made reference to unused written exhibits, enclosed therewith, which included three tape summary transcripts for Atkinson. Those were in fact full transcripts, and the three tapes spanned both the September (2 tapes) and October 1997 (1 tape) interviews (see 18.9.09, Day 66, pp142-3).

b. The application for disclosure of the statements of Tracey Clarke and Timothy Jameson expressly contemplated that any identifications or names would be redacted, and defence counsel intimated in court that they were already aware of the identity of the persons concerned from other disclosure (Transcript of hearing before McCollum LJ, 13.11.98, [75396]-[75401]; see also, Transcript of hearing before McCollum LJ, 16.12.98, [75403]).

6. It is accepted by the PPS that the defence in Hobson was entitled to disclosure of the allegation against Atkinson, who was to be called as a Prosecution witness. It is now clear that that disclosure was made and no issue remains in relation to the same.

7. It was also suggested in cross-examination of Raymond Kitson and Stephen Burnside that disclosure ought to have been made of (1) the opinion of DCS McBurney that he was suspicious of the alibi of Atkinson and (2) the opinion of the ODPP that Tracey Clarke was a truthful witness (15.9.09, Day 63, pp63-4; 16.9.09, Day 64, pp21-4). As Mr Kitson confirmed, there is distinction to be drawn between documentary evidence and opinion (p64). The former is disclosable if it is capable of supporting the defence case or undermining the prosecution case. The latter is not evidence and is not disclosable. As Mr Burnside recognised, the logical consequence of disclosing an ODPP staff member's opinion on the credibility of a witness would be to expose the opinion-holder to the risk of being called as a witness (16.9.09, Day 64, p22). That, plainly, is not what is required or envisaged by the law on disclosure. The Chairman intervened at this juncture, in the following terms:

"I am bound to say, Mr Underwood, having had to consider disclosure sitting as a judge many times, the notion that opinions would be disclosed has never arisen. I think simply the facts are disclosed and it is for others to draw their conclusion. I can't see any way in which the judge could be told, "This is what the prosecution think". If the prosecution decide, "This witness is not creditworthy", then they don't

call the witness, and that's it. There is no call then to explain why. They simply don't call the witness. It might explain why, if the issue is raised, why not." (p23)

8. The purpose of disclosure is not for the defence to gain an understanding of the prosecution's view of the strength of its own case, but to provide material which is, on the facts, capable of undermining that case or supporting the defence case.

20 Public Order Offences

20.1 The question the Panel may wish to consider is, did the ODPP adequately consider directing prosecutions for public order offences? If not, was that a want of due diligence within the terms of reference?

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We submit that the DPP failed to give effective consideration to prosecuting the large numbers of persons involved in public order offences. The failure of the police to make arrests compounded the views of many nationalists at the time who would have perceived the RUC as being biased in their enforcement of the law. In failing to direct further investigation into these offences the DPP would have alienated those who already had little confidence in the criminal justice system at that time.

However, we accept that it would not have been in the public interest to prosecute the six men who had already spent six months on remand for murder for public order offences that could not have attracted any longer sentences. In fact, to have done so would have added insult to injury.

21 Material

21.1 13/11/97 The opinion of Gordon Kerr QC was received. Regarding Marc Hobson, Gordon Kerr QC advised clarification of Con Alan Neill's evidence and that there might be a range of possible charges from murder, GBH and affray. He also concluded there was no reasonable prospect of convicting Wayne Lunt of murder or affray. For Rory Robinson he found no evidence of direct violence but at its highest, a charge of affray might be justified. (17633)

21.2 9/12/97 Raymond Kitson ODPP wrote to the Director in relation to the letter from the Secretary of State. In respect to the five persons released, regard had been given to whether they were guilty of public order offences but as they had spent nearly six months on remand, prosecution in the magistrates court for offences which carry a maximum sentence of six months was inappropriate. (18335)

21.3 10/12/97 A report was sent to the Attorney General's office from the ODPP. It was noted that consideration had been given to whether the five persons

charged by the police could be charged with minor public order offences but it had been decided that, having regard to the time spent on remand and the fact that summary offence was statute barred on 9 November 1997, it was not appropriate to prosecute in the Magistrates Court for such minor offences. (17665)

21.4 13/8/99 A note was sent from Mr [redacted], OODPP to the Deputy Director where he indicated that he had reviewed the decision in relation to prosecution in the Hamill case. He agreed with the conclusion that there was no reasonable prospect of conviction for affray, although the decision was a fine one. (18321)

Please insert any submissions or comments if you so wish

Comment

22 Mr Kerr thought there was a case for affray. Mr Kitson thought not. The Director arranged a consultation which resulted in consensus that no charge was justified. The Panel may or may not have reached the same conclusion, but it is difficult to see how that process discloses any want of diligence.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see our comments at section 20.1 above.

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

We agree with this

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions state:

"The question the Panel may wish to consider is, did the ODPP adequately consider directing prosecutions for public order offences? If not, was that want of due diligence within the Terms of Reference?" (§19, above)

2. Having set out the material, the comment reads:

"Mr Kerr thought there was a case for affray [presumably, against Robinson]. Mr Kitson thought not. The Director arranged a consultation which resulted in a consensus that no charge was justified. The Panel may or may not have reached the same conclusion, but it is difficult to see how that process discloses any want of diligence." (§22, above)

3. The PPS agrees that there is no evidence of a want of due diligence in its approach to the question of whether to prosecute any of the suspects for

public order offences. At the outset, however, the PPS wishes to make brief observations as to the scope of the Terms of Reference as they apply to this area of decision making:

a. The PPS accepts that the Terms of Reference encompass any allegation that the ODPP ought to have advised or directed further enquiries to be made before reaching a fully informed decision on whether to bring affray charges against any of the other suspects. This issue is to be judged according to a due diligence standard.

b. The PPS does not accept that the Terms of Reference permit any determination of the merits of the decision not to prosecute for public order offences, contrary, it would appear, to how the issue is put at §19 of Inquiry Counsel's Closing Submissions. The PPS does not accept that the decision not to bring affray charges shaped the investigation into Robert Hamill's murder in the sense that in consequence of these decisions, further or other investigative steps would or should have been taken.

4. Turning to the substance of the decisions, there was plainly no public interest in prosecuting for summary only public order offences, such as disorderly behaviour, as the suspects had spent nearly 6 months on remand (2nd W/S of Raymond Kitson, [82094], §35; Note of Roger Davison dated 24.10.97, [18081]; [18041]; Second Advice of David Perry QC, [82182]-[82207], §§5.6-5.8).

5. In so far as more serious public order offences, such as affray, were concerned, the case against each suspect was considered and it was concluded that there was no reasonable prospect of conviction. Affray constitutes unlawful fighting by one or more persons against another or others in a public place, or an unlawful display of force by one or more persons, in such a manner that a bystander of reasonably firm character might be reasonably expected to be frightened or intimidated: *R v Summers* (1972) Crim LR 635; *R v Taylor* (1973) AC 964; *R v Davison* [2008] NICC 25. The evidential position in relation to each suspect was as follows:

6. **Hanvey:** without the evidence of Tracey Clarke and Timothy Jameson there was no evidence which could implicate Hanvey in an offence of affray (2nd W/S of Raymond Kitson, [82094]-[82095], §36; Advice of Gordon Kerr QC, [17641]);

7. **Forbes:** again, without the evidence of Tracey Clarke and Timothy Jameson there was no evidence which could implicate Forbes in an offence of affray (2nd W/S of Raymond Kitson, [82094]-[82095], §36; Advice of Gordon Kerr QC, [17639]);

8. **Bridgett:** Mr Kitson and Mr Kerr QC considered the question of a charge of affray against Bridgett at the meeting on 18 November 1997, with Mr Davison. Mr Kitson sets out the decision-making process in his second statement to the inquiry:

> *"The possibility of prosecuting Bridgett for affray was also considered at this meeting. I was initially inclined to the view that there was some evidence which might be capable of supporting a charge of affray. Bridgett had been seen by Jonathan Wright trading punches, albeit at some distance from the main attack. My provisional view was that this might be sufficient to prove the necessary element of 'unlawful fighting'. Mr Kerr disagreed. He thought the prospects of proving affray were 'doubtful' since it was not possible prove exactly what Bridgett had done.*
> *After the meeting I reflected on Mr Kerr's advice and concluded, on balance, that he was right, and that the test for prosecution for affray was not met. The evidence of Jonathan Wright was capable of establishing that Bridgett was involved in a fight, but the other protagonist was not identified, and there was no evidence capable of showing who initiated the fight. On the evidence of Jonathan Wright the possibility of self-defence could not be excluded, and the use of force in self-defence is not 'unlawful fighting'"* (2nd W/S of Raymond Kitson, [82102], §§56-7; [18042]).

9. **Lunt:** without Mr Prunty, the case against Lunt rested essentially on the evidence Constable A. Mr Kerr QC advised in writing that a charge of affray might be difficult on this evidence ([17644]). The issue was further considered at the meeting on 18 November 1997, at which it was concluded that there was insufficient evidence to prosecute Lunt for affray:

> *"The question of an offence of affray was considered. There was the evidence of Constable A. However, with that evidence only it was concluded that a charge of affray might be extremely difficult to sustain. The situation was very confused with a lot of people running about. There is nobody to actually say what Lunt was doing and when he was doing it. The only indications as to his behaviour were that as stated by Constable A and his presence at and around the scene which led to him being arrested by Constable A. Constable A's evidence was really only to the effect that she saw him at and around the crowd and as she took hold of his arm he began kicking out with his feet. It is noted that she didn't actually arrest Mr Lunt for any offence. There was no evidence available as to what Lunt was actually doing and how much he participated in any disturbance. It was concluded that the evidence was insufficient to prosecute Mr Lunt for an offence of affray."* ([18041]; see also, 2nd W/S of Raymond Kitson, [82100], §48)

10. **Robinson:** without Tracey Clarke and Timothy Jameson, there remained some evidence of Robinson's presence at and involvement in the disorder, primarily from Jonathan Wright, Constable Neill, Constable C, Constable Silcock and Constable Adams and Constable Cooke (summarised in Gordon Kerr QC's Advice, [17644]). Mr Kitson sets out the decision-making process in his second statement to the Inquiry:

> *"In relation to the prosecution of Robinson, there was one matter on which my own view was inconsistent with the view expressed by Gordon Kerr QC in his written opinion, namely the prospects of successfully prosecuting Robinson for affray. When I reviewed the evidence on 28th October, I considered that there was clearly insufficient evidence to prove 'unlawful fighting' and accordingly that affray could not be made out. I was firmly of the view that the test for prosecution was not met. I therefore directed no prosecution on 29th October 1997 [10620/18347]. I subsequently received Mr Kerr's opinion on 13th November [17633]. In that opinion Mr Kerr expressed the view that whilst the evidence was insufficient to establish Robinson's direct involvement in the attack on Robert Hamill it would, taken at its height, support a charge of affray. I disagreed with Mr Kerr. Although I have made no note of it, it is my recollection that the matter was discussed during the consultation on 18th November. I informed Mr Kerr of my view on the affray charge and, after discussion, he agreed with me. I did not record this discussion in my note of the consultation. It would not have been necessary for me to record this as it required no further action. The 'no prosecution' decision had already been taken in relation to Robinson and encompassed both murder and affray."* (2nd W/S of Raymond Kitson, [82104]-[82105], §62)

11. Mr Kerr QC confirmed in evidence that, as a result of the meeting on 18 November, he agreed with Mr Kitson's assessment that there was insufficient evidence for a charge of affray. He also noted that it was not unusual for there to be an initial disagreement between himself and a senior directing officer such as Mr Kitson, and for that to be discussed and a final decision reached (16.9.09, Day 64, pp134-5).

12. The issue of charges of affray against Robinson and Bridgett was raised by the Director with Mr Kitson during the meeting on 9 December 1997, convened to discuss a letter to be sent to the Attorney-General concerning the Robert Hamill case (2nd W/S of Raymond Kitson, [82105], §63). The Director enquired as to the apparent difference of opinion between Mr Kerr QC's written advice in relation to Robinson and the final decision that had been reached. He also enquired as to the decision in relation to Bridgett. Mr Kitson explained the position to him. On 10 December 1997, a further meeting took place at which the draft letter to the Attorney-General was again discussed. The Director wanted to clarify directly with Mr Kerr QC that the content of the letter reflected his advice and the discussions as Mr Kitson had relayed them. Mr Kerr QC accordingly attended the Director's office and confirmed that the letter accurately recorded his position. An annotation to this effect was placed on a draft of the letter ([18230]; 2nd W/S of Raymond Kitson, [82105], §63). The salient paragraphs of that letter record that Mr Kerr QC and Mr Kitson were in agreement that there was insufficient evidence to prosecute Lunt ([18238], §22), Robinson ([18233], §11) and Bridgett ([18239], §23) for affray.

13. The decisions of the ODPP in relation to charges of affray formed part of the internal review by Mr White, conducted in 1999, and the more recent independent review by David Perry QC. Both took the view that the decisions on all cases were reasonable:

a. See Mr White's report, [18321], at §6 (Forbes, Hanvey, Robinson), §15 (Lunt) and §26 (Bridgett). In relation to Bridgett, Mr White observed that the evidence was more *"evenly balanced. However, it was disjointed. Overall, I agree with the conclusion that there was no reasonable prospect of a conviction for affray, although I would acknowledge that the decision was a fine one."*
b. See the first Advice of Mr Perry QC, [82136]-[82180], at §9.6 (Forbes), §9.10 (Lunt), §9.14 (Hanvey), §9.18 (Robinson), §§9.27-8 (Bridgett) and §9.33-4 (Lunt).

14. In light of the above, the PPS submits that there is no basis on which it could be said that the decisions not to prosecute for affray were taken without due diligence. Each decision was taken with careful consideration and with the benefit of advice from (and discussion with) Senior Crown counsel, scrutinised by the Director where appropriate, subsequently reviewed by Mr White, Senior Assistant Director, and described as reasonable by Mr Perry QC.

Robert Atkinson

23 The two primary questions are:

23.1 (Issue 116): Did the ODPP act with due diligence prior to June 2000 in relation to the information that Robert Atkinson tipped off Allister Hanvey?

23.2 (Issue 132): Did the ODPP act with due diligence after June 2000?

23.3 The secondary question is whether any want of due diligence falls within the terms of reference?

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

It is submitted on behalf of Robert Atkinson that at all times the DPP acted with proper diligence

24 Witnesses

Christine Smith

Statement

24.1 Para 5: On 21 October 2003 she consulted with Andrea McKee in Wrexham police station. The purpose was for Andrea McKee to relate what would be her evidence. What she said was entirely consistent with her statement. She

appeared to be a plausible witness and was willing to give evidence for the prosecution.

24.2 Para 7: The committal was adjourned from 27 October 2003 to 22 December 2003. The date was fixed taking into account the availability of Andrea McKee.

24.3 Para 8: On 22 December 2003, she attended court to conduct the committal but was advised that Andrea McKee would not be attending.

24.4 Para 9: Andrea McKee had said that she was unable to travel to court that day because her son was ill with swollen testicles and suspected mumps. She advised the defence in the same terms. The defence were sceptical and agreed to the adjournment on the condition that some proof of the illness was provided on the next occasion.

24.5 Para 10: On 9 January 2004, she had another consultation with Andrea McKee. There was an issue over Pendine. She was particularly concerned to get the detail of the child's illness because she might have given the court a misleading reason for non-attendance.

24.6 Para 11: The statements from Dr [redacted] had been received by the time of the consultation. These were totally inadequate as there was no reference to 19 December, and the reason he saw the child on 11 December was an ear infection, not the reason given by Andrea McKee.

24.7 Para 12: After the consultation Miss Smith had real concerns about Andrea McKee's credibility. Her attitude was that she wanted to give evidence, but on her terms and Miss Smith did not think that her terms could be met.

24.8 Para 14: Miss Smith had a brief discussion about the future conduct of the case with those who had attended the consultation. She understood that the police were to follow up the threatening letter and whether they could offer Andrea McKee some witness protection. Andrea McKee was happy to move to another address in [redacted] but it had to be a certain area. That did not seem practical and made Miss Smith question the authenticity of the threat.

24.9 Para 16: As a result of the consultations it became clear that Andrea McKee could not be put forward as a witness of truth as her credibility was shot.

24.10 Para 17: The issue of Pendine was a wholly peripheral issue and not directly relevant to the evidence in the Atkinson prosecution. However, as she had lied on a peripheral issue, her entire credibility was in question.

Oral Evidence

24.11 81924 was inaccurate in that she did take a note of the first consultation. The mistake came as she had subsequently seen some documents from the PPS that she had not had seen before the interview (p70).

24.12 Para 9 81924 was accurate about what happened on 22nd December (p71). The medical evidence required was what they could produce to establish the child was ill on that date and was suffering from the conditions Andrea McKee had described. The defence were not satisfied that was the reason for her non-attendance (p72) and that if the child was ill it was an excuse for non-attendance. They tried to get proof the same day. Patricia Murphy was told Andrea McKee's surgery would not release information without Andrea McKee's say-so and so the surgery called Andrea McKee that morning (p73). The note dated 22nd December referring to "medical certificate" meant medical evidence of some sort (p74) "certificate" was said by someone else in court but she could not remember who (p84).

24.13 The statements of Dr [redacted] at 34042 and 59853 were probably given to the defence. Miss Smith thought they were inadequate as they did not refer to the child being ill on that weekend 19th and 20th (p76) and did not refer to swollen testes. Miss Smith received them on the 30th, after she found out about the issue over whether the child had been seen on the weekend. She thought the statements were inadequate to show (p77) the information she had given the court was correct that the child was seriously ill, which she had also told defence counsel (p78). She did not advise asking the GP how ill the child was. She did not consider that in consultation with the ODPP (p79). She did not ask how ill the child was as she understood the doctor had been spoken to by the police and asked for a statement (p80). She believed that was all she would be getting. That was the line from her instructing solicitor (p81). Miss Smith denied that para 11 "[Statements] was totally inadequate as regards satisfying the court for the reason of the adjournment in that there was no reference to 19th December" was wrong (p82) Miss Smith said that they were told by DC Patricia Murphy that Andrea McKee had seen the Doctor over the weekend (p83).

24.14 The consultation with Andrea McKee on 2nd January about Pendine (per para 81924) was also about the threatening letter and that they were not clear from the medical evidence that Andrea McKee had given them the correct information about the illness (p86). Para 12, that Miss Smith was concerned about Andrea McKee's credibility, was added to. She felt Mrs McKee was not working to what was required to fulfil Andrea McKee's conditions of giving evidence, i.e. that her family were safe, e.g. by not being prepared to move house (p88). Miss Smith did not hold that against her but wondered how bad the threat could be given that Andrea McKee was not prepared to move house (p89). Andrea McKee wanted to move house within a few hundred yards: it was the current address that was the problem (p91). On reflection, after the consultation, Miss Smith wondered if Andrea McKee was after something. For example she said "I wouldn't want to live in a dump" (p101). This did not have an effect on the assessment of her credibility at the time (p112).

24.15 Miss Smith did not accept that 33989 said that the opposite of para 12 of 81928 (p93). She said that she parked the issue of Andrea McKee's credibility at the time and had come to a conclusion when she made her statement. She was concerned at the time but gave Andrea McKee the benefit of the doubt as investigations were still being carried out (p94). Miss Smith believed they

would still call Andrea McKee at that stage. She believed she was of the same mind about that as Mr Morrison (p96). Mr Simpson was aware of the change of mind Miss Smith and Mr Morrison had about Andrea before he consulted with her (p104).

24.16 Miss Smith was not conscious that when the Director made the decision about discontinuing the prosecution, he remained of the view that Andrea McKee was telling the truth about the conspiracy. She remembered explaining to the police why Andrea McKee's credibility would be so damaged that she could not be put forward (p97). The test would be whether a witness can be demonstrated to have lied. The question is whether their credibility would be so damaged that there would be no reasonable prospect of conviction (p98). It was not a concern that the magistrate would throw the case out but whether Mrs McKee would be believed at trial (p99).

24.17 Andrea McKee was the essential prosecution witness and without her the case could not proceed (p103).

24.18 Miss Smith accepted that sometimes a parent will be more anxious about a child's health than a Doctor (p108).

24.19 The threatening letter was sent on 19 October from Belfast. Miss Smith's doubt over the letter did not affect her assessment of Andrea McKee's credibility at the time (p114).

24.20 Miss Smith thought Andrea McKee was lying not because of the son's illness, but because she would not miss her appointment on 23rd December (p115). In October Andrea McKee did not know about the medical in December but she was saying that she would only come for one day (p116). Andrea McKee had been told that they would try and get it all done on one day but it could not be guaranteed (p117). Miss Smith does not criticise Andrea McKee for her medical appointment but criticised her for the dishonesty around it (p118). Miss Smith did not know of the appointment on the 23rd until thereafter as it came out during the discussion about the threatening letter (p120). A part heard hearing would not have been an easy application to get granted as the dates had been arranged in October (p121).

24.21 Miss Smith was never given an explanation for the fear of a fit and the high temperature from Andrea McKee, as included in Patricia Murphy's notebook (p126). Per 33911, Miss Smith knew of the risk fits and a high temperature on 22 December (p131). She would have told the court about that (p132).

24.22 Miss Smith did not think that the Pendine issue was told to the defence between 22 December and the withdrawal of proceedings (p129)

24.23 Miss Smith had been at the Bar for 24 years and started prosecuting regularly since 1990. She had appeared solely in the Crown Court since 2002 (p129). Assessing witness credibility was part of the job (p130)

24.24 Miss Smith believed the matter was put back to 2nd January for the medical evidence to be produced and the matter would then be considered (p137).

24.25 On 9 January, Andrea McKee told Miss Smith she had gone into the consultation room with a grey-haired Doctor (p142). She remembered having a conversation with Mr Simpson about the grey-haired Dr and Mr Simpson saying Andrea had told him something different to what she had told Miss Smith (p143).

24.26 People with "heinous" previous convictions had been relied on to give evidence in court but not by her (p145). Miss Smith was not aware of any other previous conviction of Andrea McKee other than the guilty plea to the conspiracy (p146)

24.27 Pendine was not an issue peripheral to credibility. It was peripheral to the issue of whether the defendants were guilty (p147).

24.28 Christine Smith worked mainly on prosecution cases and this was the first and only time she worked with Ivor Morrison (p148).

Ivor Morrison

Statement

24.29 Para 2: He first took over the prosecution file of the Atkinsons and Kenneth Hanvey in October 2002. This was because Michael Matthews had a heavy case load.

24.30 Para 4: All of the defendants objected to a paper committal and required that Andrea McKee and other witnesses gave evidence.

24.31 Para 6: At the consultation on 21 October 2003 Andrea participated fully and indicated her willingness to give evidence. She said that due to family and study commitments she wished to travel in the morning and return that night.

24.32 Para 9: On 22 December 2003 he was told that Andrea McKee had told DC Murphy that her son had mumps, ochitis, a high temperature and he was in danger of fitting. He made a note of the proceedings (34061).

24.33 Para 11: Dr [redacted]'s statement of 24 December was not consistent with Andrea McKee's reasons for not attending on 22 December and it would have been attacked by the defence

24.34 Para 12: On 30 December, Andrea McKee mentioned two further visits: one on 11 December to her GP, records of which were confirmed and a visit to Pendine on 19 December.

24.35 Para 13: He did not put the medical evidence to the magistrate for any/all of these reasons: - The risk that the evidence did not support the claim; the

possibility evidence might be found at Pendine; it was not proper to rely on Dr [redacted] once Mr Morrison was aware of Pendine; and that as Andrea McKee had received a threatening letter, it could suggest to a terrorist organisation that she was going to give evidence.

24.36 Para 17: During the consultation on 9 January, Andrea McKee stated that she thought her son's condition came from the MMR vaccination from some months before. She mentioned that her doctor had been worried by the swelling of her son's testicles. She also mentioned that the doctor at Pendine was old with grey hair.

24.37 Para 18: Andrea McKee did not want to give evidence unless she was moved to a new address but she would not move away from Wrexham.

24.38 Para 19: At the consultation on 26 February the Director said that he had to be sure that every proper step had been taken and he said that Andrea might remain credible on the main issue.

24.39 Para 23: Mr Morrison wrote to the Director on 16 March 2004. He provided a Minute (33919) and a summary of events (33909). The Director decided to direct the withdrawal of the charges.

24.40 Para 26: He did not recall considering whether to compel Michael McKee to give evidence but on reflection, he did not consider there would be any merit in compelling someone who had not made a witness statement, and who had stated his unwillingness to give evidence

24.41 Para 27: He believed the prosecution could not present Andrea McKee as a credible witness when they knew that she would lie to the court on a disputed issue. He believed she would not restrict her untruths to any particular part of her evidence. He believed the defence would have exploited this to the extent that any jury would have entertained reasonable doubt.

Oral Evidence

24.42 In 20297 Andrea McKee gave evidence about the content of the phone call and the way in which the cover up was formulated (p15). The reasoning in prosecuting the Atkinsons and Mr Hanvey for perverting the course of justice was that they did not have to prove the content of the phone call (p15). Michael McKee knew more about the phone call than Andrea and he was not cooperating (p16)

24.43 Per 34061, Andrea McKee said that her child had mumps as opposed to suspected mumps and that is what the court had been told (p17). The defence were sceptical of Andrea's reasons for not travelling. They wanted evidence of her child's illness so there was a conditional adjournment to 2 January to produce evidence in line with the information submitted to court (p18). If there was no evidence, it was very unlikely the magistrate would have stopped the case. It just would have meant the case was definitely going ahead on 8

March (p19). “Certificate” was a shorthand way of describing satisfactory written evidence (p20).

24.44 34042 only showed one visit three weeks before the court date (p20) and he mentioned “suspected mumps” and did not mention swollen testicles. He did not expect it to mention high temperature and danger of fitting, which was mentioned to DC Patricia Murphy. He did not know if it was a reasonable inference from the two ear infections that the child might have a high temperature (p21). He agreed that a child of two with the possibility of mumps and ear infections over the course of December would worry its mother. He posed the question, "Why did Andrea McKee not tell DC Patricia Murphy on the 19th that she was worried about the child or mention Pendine on the 21st"? (p27). He expected to get satisfactory evidence supporting Andrea’s version. At the time he would have expected swollen testees to be mentioned by the Doctor. He thought that it was unfortunate that the Doctor did not keep good records (p28).

24.45 The matter did not go the court with witness statements on 2nd January (p29) as the evidence he did have was not fully consistent with what the court had been told. In addition, the Pendine issue had been raised. He did not get statements about Pendine until the morning of 2nd January. He wanted the Pendine information as it might have dispelled inconsistencies in the Doctor’s statements (p30). He could not rely on the Doctor without mentioning Pendine as it needed to be disclosed. In addition, he knew Andrea had received a threatening letter and he could not let the case appear to be proceeding with her appearing to be willing and able to give evidence as that could have put her in danger (p31). They did not give consideration to asking for a medical report from the GP as they had statements from him (p34). That the report on 11 December did not mention swollen testes, was not of concern to him (p38). If what was contained in 33991 was true, then he would still have wanted the Pendine information and whether he could move the case forward in light of the threatening letter (DCI P39).

24.46 On 2nd January, they disclosed the statements of the GP to the defence (p41). Per 33912, he believed that there was no evidence to support what she was saying about the treatment at Pendine (p42).

24.47 He did not believe what Andrea McKee had said on 9 January but he did not give consideration to checking with the GP (p46).

24.48 Per Para 18, 82020 he felt Andrea McKee was setting impossible conditions on giving evidence (p47). He was never given the information that the witness protection team were happy to protect Andrea McKee in Wrexham (p48). The impossible conditions remained throughout the consideration of using her as a witness. The impossible conditions were that the police could not put her in witness protection unless she moved (p49). That was what DCI K had focused on. Mrs McKee said “I will give evidence if I am safe”, and he got the impression from police that she would only be safe in witness protection and could only be in witness protection if she left Wrexham (p50).

24.49 34071 did not raise a problem about prosecuting Res Con Atkinson, having used him as a witness before. He did not take much notice of the letter as he was focused on disclosure (p52). It did not cross his mind it would be embarrassing to prosecute Res Con Atkinson, having used him as a witness against Mr Hobson (p53).

24.50 33919 was a fair reflection of his views that as a result of her lies about Pendine, Andrea McKee would not be a credible witness (p55). He believed 33914 to be true, that there was insufficient evidence about the illness and the magistrate would throw out the case. He believed there was a difference in approach, not a contradiction (p56). They dealt with different parts of the prosecution; the difficulties of getting the defendants committed and what would actually happen at trial (p57).

24.51 Mr Morrison had never been a freemason (p57) or had had a close relationship with Richard Monteith (p58).

24.52 The medical certificate was to show that Andrea McKee's belief was well-founded (p59) It was needed to prove that Andrea McKee was not coming not because she wanted to avoid giving evidence (p60)

24.53 Part of the problem Mr Morrison had was that Andrea McKee said nothing on the 19th, and then mentioned the illness on the 21st (p64). Per 33913, on 27th February defence teams were saying that the court had been misled. He did not believe that there was nothing in the medical evidence inconsistent with Andrea saying she thought her son had mumps (p72).

24.54 Pendine was directly relevant to her non-appearance (p74).

24.55 The Director in the meeting on 26th did raise the issue that, despite Pendine, Mrs McKee might be believed on the main issue. It was something he required to be explored and be satisfied about (p79). They could not call her on the question of Pendine. It was the Director's decision to send Mr Simpson to see Andrea McKee (p80). The Director wanted to know if Mrs McKee would still be credible (p82). The question to ask themselves was if the prosecution examined her on Pendine, would that affect her credibility on the main issue. However, ultimately their concern was how she seemed as a witness in the case itself (p83). It was a major issue that Andrea McKee was not coming along to clear out all her lies, which would make her a compelling witness, but that she had created a lie recently (p84). The court would tell the jury to carefully consider the main issue, if she were telling a lie in evidence (p92) and that was considered, including by the Director (p93).

24.56 Andrea and Michael McKee's convictions were admissible and they were viewed as powerfully supporting the prosecution (p90).

24.57 Andrea McKee would have been cross-examined at the mixed committal and the defence might attempt to ask her about her credibility (p108). The prosecutor would have disclosed Pendine before that had happened. The prosecutor could object to Pendine being a collateral matter during the

committal (p109). If the evidence was not severely damaged at that stage then they would have returned her to trial (p110). At trial she could be examined on credibility but Mr Morrison did not go as far as to consider that as the department had already considered her to be unreliable (p111)

24.58 That Andrea had not mentioned the child's illness on the 19th was a factor discussed with Mr Simpson as being relevant to Pendine (p116).

24.59 When he became aware of the Pendine investigation he was being told that the police were going to take statements from the Pendine doctors that evening. He did not have a role in directing the police investigation (p118).

24.60 He did not know for certain when the statements were given to the defence but he would have told the prosecution there was more to it (p121).

24.61 Mr Monteith was asking for what was said on 22nd December, not 2nd January (p122).

24.62 The magistrate, when he thought the court had been misled, (33913) was referring to the statements not supporting the facts as stated on 22nd December. Mr Morrison did not think the magistrate was aware of the Pendine issue (p126).

24.63 Mr Morrison did not know if in the consultation on 7th January, Andrea McKee was asked about the discrepancy between her saying the Pendine doctor was a woman and then saying that he was a grey-haired man. However, she was asked in detail about the examination itself (p128). This, and the change in her story from being in the examination room to being outside, made the prosecution feel that she was prepared to change her facts (p129). The prosecution felt that if Andrea was backed into a corner, she might change her story and that destroyed her credibility (p130). The assessment was made on the basis of chance of conviction at trial (p131). That the case might get through the committal was irrelevant if there was no reasonable prospect of conviction (p133).

24.64 Mr Morrison did not believe that the McKees had falsely pleaded guilty. He did not believe that a jury would find they had (p133).

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We believe that Mr Morrison's assessment of the guilty pleas entered by the McKee's (and therefore the admissions they made regarding the false alibi for RC Atkinson) to be the only correct and logical conclusion which can be reached.

Miss Smith's assessment that without Andrea McKee the case could not proceed (24.17) is questionable. In the first place, Andrea McKee had already pleaded guilty to perverting the course of justice, so her credibility was always going to be an issue. Her failure to turn up at the committal hearing was badly handled, with the DPP doing too little to establish the truth, and giving

insufficient consideration to the threatening letter. Not only could he have continued to use Andrea McKee as a witness, but he had a number of other assets he could have deployed. In the first place, the conviction of the McKees was a matter of public record, and showed that there had been a conspiracy. Secondly, there were the telephone records. Thirdly, the Atkinsons and Kenneth Hanvey had demonstrably lied. Fourthly, Thomas Hanvey has given RC Atkinson a false alibi. A jury did not need to have faith in Andrea McKee's credibility to make sense of the case.

In our view, Miss Smith's concerns about her own credibility, in that she had, through no fault of her own , misled the court (24.13) may have clouded her judgement about the significance of Andrea McKee's credibility.

The double standard applied by the DPP to credibility is very neatly demonstrated by Ivor Morrison's blithe approach at paragraph 24.49.

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

See submissions in Section 8

Comment

25 The ODPP became aware of the tip-off allegation on 12 May 1997. When it received the murder file in August 1997 it was told that a further file was to be submitted about the tip-off. It seems to be common ground that such an allegation was of the utmost seriousness and that it was connected to the murder in that it suggested an offence as accessory. The Director himself recognised the interconnection between the neglect complaint and the murder charges before any file had been delivered.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see our comments at section 8 above.

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

It seems harsh to potentially criticise the police for not treating the tip-off allegation as part of the murder investigation (accessory), when the DPP were aware of the allegation of Tracey Clarke in July 1997.

Submissions by the Public Prosecution Service

Please see the response to §25, below.

26 Nonetheless, the ODPP appears to have taken no step to ensure that the decisions on the murder file were informed by the tip-off allegation. The Panel may wish to consider whether that was a want of due diligence and, if so, whether it shaped the murder investigation. The interplay between the murder and the tip-off was not confined to the fact that a tip-off, if proven, would have

amounted to an offence as accessory to the murder. It raised the possibility that Mr Atkinson had seen Mr Hanvey committing an offence and, accordingly, that he could give evidence against Mr Hanvey.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We invite the Panel to consider whether proper consideration was given to calling RC Atkinson as a witness. We query why Sir Alasdair Fraser did not consider consulting with RC Atkinson. We also query why Ms Clarke and Mr Jameson's police questionnaires were not provided to the DPP. Sir Alasdair Fraser expressed surprise that they were not shared with his office yet it appears that no direction was issued to obtain them. (paragraph 5.164).

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

There was never any prospect of Atkinson giving evidence against Hanvey, as to have done would so would have incriminated himself as an accessory to murder.

Submissions by the Public Prosecution Service

1. Inquiry Counsel's Closing Submissions state:

> *"The ODPP became aware of the tip-off allegation on 12 May 1997. When it received the murder file in August 1997 it was told that a further file was to be submitted about the tip-off. It seems to be common ground that such an allegation was of the utmost seriousness and that it was connected to the murder in that it suggested as offence as accessory. The Director himself recognised the interconnection between the neglect complaint and the murder charges before any file had been delivered.*
>
> *Nonetheless, the ODPP appears to have taken no step to ensure that the decisions on the murder file were informed by the tip-off allegation. The Panel may wish to consider whether that was a want of due diligence and, if so, whether it shaped the murder investigation. The interplay between the murder and the tip-off was not confined to the fact that a tip-off, if proven, would have amounted to an offence as accessory to the murder. It raised the possibility that Mr Atkinson had seen Mr Hanvey committing an offence and, accordingly, that he could give evidence against Mr Hanvey."* (Part 18, §§27-8)

2. The ODPP was first informed of the tip-off allegation at the meeting on 13 May 1997 (not 12 May 1997) between Mr Kitson, Mr Junkin, DCS McBurney, DCI P39 and DS xxxxx. During that meeting the ODPP was told that R/Con Atkinson was *"subject to further investigation"* ([31608]). It was suggested during the evidence that, at this juncture, the ODPP should have exercised its power under Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972. This, with respect, misunderstands both the

power conferred by that provision and the interrelation of the Police and the ODPP. Article 6(3) makes provision enabling the Director to request the Chief Constable to conduct an investigation where none is currently being undertaken (see, for example, W/S of Sir Alasdair Fraser, [82033], §5). As at 13 May 1997, the ODPP was unequivocally told that an investigation was being carried out into R/Con Atkinson and had no reason to doubt that it would be properly conducted (2nd W/S Raymond Kitson, [82089], §19). There was, accordingly, no basis or need for the ODPP to exercise its power under Article 6(3). In so far as the conduct of that investigation was concerned, the PPS has set out above, the general position as to the interrelation of the Police and the ODPP prior to submission of a police investigation file. In short, it was not for the ODPP to advise the Police as to how to conduct the investigation into R/Con Atkinson or, indeed, into any other criminal offence.

3. The further criticism levelled at the ODPP is that it failed to ensure that its decisions on the murder prosecutions, and in particular the decision not to prosecute Hanvey, were informed by the allegations against R/Con Atkinson. That, it is said, may amount to a want of due diligence. The PPS does not accept that criticism for the reasons set out below.

4. On 15 August 1997 the ODPP received a confidential memorandum from the Police which stated that a police file was to be submitted on the tipping-off allegation: the ODPP was therefore expecting to receive that file (2nd W/S of Raymond Kitson, [82095]-[82096], §38). As Mr Kitson explained, *"Plainly, the allegation against RC Atkinson could have been relevant to a murder prosecution, particularly of Hanvey. The allegation made by Tracey Clarke was, in essence, an allegation that RC Atkinson had acted as an accessory to the murder by assisting an offender. If the file had been available, I would undoubtedly have considered it alongside the murder file."* The ODPP was fully aware of the potential evidential value of the material which may be garnered from the investigation into the tipping-off allegation.

5. However, as Mr Kitson went on to explain, *"Any consideration of the hearsay allegation made against Reserve Constable Atkinson by Tracey Clarke was overtaken by events when she declined to give evidence and a decision was reached that she could not be compelled and the conditions for seeking the admission of her witness statement were not met. If, subsequently, a file had been received which provided new evidence against Hanvey then the 'no prosecution' decision would have been reconsidered. However, without the evidence of Tracey Clarke there was no case against Hanvey and there was no other evidence available to me in support of the tipping off allegation. It would in those circumstances have been wrong to continue the prosecution or to have sought a continuation of Hanvey's remand in custody."* (§38).

6. The ODPP was aware of the potential significance of the tip-off allegation to the prosecution of Hanvey, but absent Tracey Clarke's evidence, neither the direct evidence implicating Hanvey in the murder, nor the crucial evidence in the tip-off allegation, was available. In those circumstances, there is no warrant for the suggestion that the ODPP failed to act with due diligence

by taking decisions on the murder prosecutions before receipt of the police investigation file into the tipping off allegation. Hanvey and the other accused were all in custody. After the decision had been reached to abandon reliance on Tracey Clarke and Timothy Jameson, there was no case against them to justify further detention. In those circumstances, it was imperative that a decision be taken promptly. It would have been improper and unlawful for a prosecutor to maintain the charges, and to seek a further remand in custody in the hope that further evidence might emerge following receipt of the tipping-off file. As Mr Kitson explained, nothing would have been lost by making the decision at this point in time because it could be revisited if further evidence were subsequently to emerge. Moreover, the criticism levelled at the ODPP is, in any event, entirely academic. When the file was submitted there was insufficient evidence to prosecute Atkinson for the tipping-off allegation. It is common ground that the test for prosecution was not met. In these circumstances, it is artificial and unrealistic to criticise the ODPP for failing to "call in" the tipping-off file at any earlier stage since it could have made no difference at all to the decisions which were taken.

7. For the sake of completeness, the PPS also wishes to outline the circumstances surrounding its decision not to prosecute for neglect of duty or perverting the course of justice in 1999.

8. The PPS does not understand there to be any criticism of its substantive decision in 1999 not to prosecute any of the officers in the Landrover for neglect of duty, nor to instigate a prosecution against R/Con Atkinson at that stage. For completeness, however, the PPS sets out below a short summary of the decision-making process on these issues:

a. On 13 February 1998 the ODPP received the police investigation file into the neglect of duty allegation against the four officers in the Landrover and the perverting the course of the justice allegation against Atkinson on 13 February 1998 ([09028]; 2nd W/S of Raymond Kitson, [82107]-[82108], §69). Mr Kitson considered the file, which recommended no prosecution on all charges, and allocated it to Ronnie McCarey ([19470]; 2nd W/S of Raymond Kitson, [82107]-[82108], §69). Mr McCarey issued an Interim Direction stating that decisions in the case would pend a consultation with DCS McBurney ([19469]).

b. Mr Kerr QC was instructed to advise on the file, and that undated advice was received during or before May 1998. In summary, Mr Kerr advised ([19334]):

i. The elements of the relevant offence, neglect of duty, were set out in *Dytham* 69 Cr App R 387: *"Every public officer commits a misdemeanour (offence) who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter. The neglect*

must be wilful and not merely inadvertent; and it must be culpable in the sense that it is without reasonable excuse or justification."

ii. A number of witnesses noted a presence or absence of police officers at various points during the fight, Dr McDowell's report commented on the view the officers would have had from inside the Landrover, and all four officers had been interviewed about the incident;

iii. On all the evidence, the precise timing and sequence of the attack on Mr Hamill was not possible to ascertain and never would be. There were a number of matters which were *"common case"*:

> 1. *"The incident involved a substantial aggressive crowd to be contained by 4 police officers.*
> 2. *Nobody agrees on the sequence of events, but within a short space of time from the first fighting the matter became extremely serious.*
> 3. *It is common case that at some stage police did in fact get out of the Landrover and did in fact intervene. They in fact took one person to the Landrover and were seen by witnesses intervening with others. Only the timing is in dispute.*
> 4. *Reinforcements were sent for and the police at the scene remained and continued their efforts until and after held arrived.*
> 5. *An ambulance was tasked by them and during that period they remained active."*

iv. *"In the absence of some clear and cogent evidence on the papers that the officers involved saw the attack happening and deliberately stayed in the vehicle I cannot see either individually or collectively any basis for a suggestion that the behaviour of the officers was so negligent as to be a wilful breach of their clear duty to prevent or deal with offences. In reality the officers did in fact debus, intervene, try to prevent further attacks on the deceased, try to restrain and arrest those involved, reported the matter to their authority and sought both assistance and medical treatment for the victims. It may be said that they could have been quicker and may have deployed their resources in a better way but I do not feel the evidence exists to show that this patrol were wilfully in dereliction or discharge either collectively or individually. This opinion is of course based on the evidence that I have read. In order to ensure that all relevant evidence has been considered the Department may consider it prudent to write to the complainant(s) through Ms Nelson informing them that a decision on the complaint file is being considered and inviting any evidence they may have to be*

sent for consideration by the Department before this is finalised."

v. In relation to the allegation against R/Con Atkinson, and with reference to the statement of Tracey Clarke, Mr Kerr advised:

> *"The statement was not available for use in the prosecution case as the witness intimated refusal to give evidence at consultation. It would seem clear to me that the refusal would extend to this file as well. In addition the complaint is based on her hearsay evidence of what she was told by Hanvey. Hanvey will not give evidence to this effect. The allegation was that Hanvey was rung by Atkinson the morning after and told to get rid of his clothing. It was expanded to the fact that Atkinson was keeping him informed about progress. This has now been further investigated.*
>
> *It has been established that there was contact by telephone between the homes of Atkinson and the Hanvey's on the 27th April 1997 and 2 May 1997. In interviews of various of those connected with the two families it appeared that there was some contact on a social basis between the families. It appears however that the Hanvey family and in particular the father of the suspect were not on good terms with Constable Atkinson. The calls were explained by those involved. A Michael McKee accepted that he had been the person who made the call on the 27th. This was confirmed by the Hanvey's. McKee it must be said showed remarkable powers of memory in that he recalled this when asked in October. The call in May was acknowledged by Mrs Atkinson to be hers relating to martial arts uniforms. This again was confirmed by the Hanvey's.*
>
> *Whatever the truth of the phonecalls the reality is that they in themselves don't prove anything but would merely go to prove any admissible direct evidence which established this allegation, there is no such evidence and therefore there can be no reasonable prospect of a conviction on this allegation."*

c. In accordance with Mr Kerr's advice, on 12 May 1998 Mr McCarey issued an interim direction asking the police to contact Rosemary Nelson solicitors to see whether the Hamill family were in a position to identify other witnesses or evidence relevant to the neglect of duty allegation ([15148]; 2nd W/S of Raymond Kitson, [82110], §78). There then followed a number of letters between the ODPP and

Rosemary Nelson solicitors concerning potential witnesses (see, for example, [62232], [19156], [19158], [19160], [62238]).

d. On 20 October 1998 the ODPP received two further statements from Rosemary Nelson solicitors, made by Colin Hull ([15048]-[15049]) and Vincent McNeice ([15047]). Mr Kerr QC was asked to review those statements. His written advice concluded:

> *"Having reviewed the new statements I repeat my view contained in para 8 of my previous opinion with one amendment. Para 8(c) can no longer stand as it is not on these statements common case that the police in fact intervene. However, the effect of the new statements increases the uncertainty as to the evidence and in doing so decreases the prospect of a conviction."* ([19343]).

e. On 22 January 1999 Mr McCarey issued a further Interim Direction stating that the final decision on the file would pend the conclusion of the Hobson trial and take account of any material emerging from the same ([19369]; 2nd W/S of Raymond Kitson, [82110], §79).

f. Following the judgment in the Hobson trial on 25 March 1999, the ODPP sought transcripts of the evidence in order to review the position in relation to the neglect/Atkinson file (2nd W/S of Raymond Kitson, [82110], §79). DCS McBurney reviewed the transcripts and concluded that no new lines of inquiry arose out of the same (2nd W/S of Raymond Kitson, [82110], §80). Mr Kerr QC also reviewed the transcripts and concluded that they did not affect his view that there was no reasonable prospect of convicting any officer for the neglect of duty offence ([19345]; 2nd W/S of Raymond Kitson, [82111], §81). Mr Kerr provided a final opinion on 1 July 1999 in which he concluded that there had been no change in the evidential position in relation to the Atkinson allegation and therefore his earlier opinion was unchanged (2nd W/S of Raymond Kitson, [82111], §81).

g. During July 1999 Mr McCarey reviewed the neglect/Atkinson file in detail and concluded: (a) that, although the officers could, with hindsight, have better directed their actions after being alerted to the risk of disorder by Mr Mallon, their conduct did not disclose a criminal neglect of duty; (b) that the evidence in relation to the allegations against R/Con Atkinson was insufficient to warrant prosecution, because whilst the evidence of the phone calls was suspicious, the witness statements from the McKees and Mrs Atkinson provided an explanation.

h. On 9 August 1999, Mr Kitson received notification from the ICPC to the effect that they had not identified any further lines of enquiry (2nd W/S of Raymond Kitson, [82111], §83; Exhibit RAK6 [82132]). Mr Kitson's second statement to the Inquiry records:

"On the same day, I referred the file for decision to Roy Junkin, the Deputy Director. From my covering memorandum it is clear that I had read Mr Kerr's Opinions, as well as Mr McCarey's detailed memorandum on the case. I expressed the view that I had nothing to add. I concurred with the opinion that there was no reasonable prospect, on the available evidence, of prosecuting any officer for any offence. I did not refer to the allegation against Reserve Constable Atkinson separately but it was dealt with separately in the Opinions of Gordon Kerr QC and in the detailed memorandum prepared by Mr McCarey.

From the file I can see that the matter was subsequently referred by Mr Junkin to Alan White, who was then Senior Assistant Director, for his views. There is a memorandum on file from Mr McCarey, dated 26th August 1999 to this effect [referred to as RAK7]. This would have been normal procedure since Mr White reported directly to Mr Junkin. On 2nd September 1999 Mr White added his views to the file. He agreed that the evidence was insufficient to prosecute any officer for the neglect of duty offence. As regards the allegations against RC Atkinson, he expressed the view that there was no evidence on which to base a prosecution. He pointed out that Witness A's allegations were hearsay, and that she had, in any event, refused to give evidence.

The final decision was made by Mr Junkin on 24th September 1999. In his file note he has recorded that he read all the relevant material, and had considered the advices of counsel as well as the file notes provided by Mr McCarey and Mr White to the effect that the available evidence was insufficient to afford a reasonable prospect of conviction against any of the officers. He expressed agreement with their advice and concluded that a direction for no prosecution should issue. The direction was issued on 29th September 1999 [62249]. The case against RC Atkinson was therefore independently considered by four members of the ODPP as well as by senior crown counsel. All concluded that the evidence was, at that stage, insufficient to afford a reasonable prospect of conviction." (2nd W/S of Raymond Kitson, [82111]-[82112], §§83-5)

27 After June 2000, the ODPP was involved in the decisions to treat Andrea McKee as a defendant and not to defer her sentence until after she had given evidence against Res Con Atkinson and others. That raises the question whether those decision were attended by due diligence.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see our comments at 24.64 above. In our opinion, the DPP lacked due diligence in dropping Andrea McKee without fully exploring her reasons for not attending the committal hearing and in not taking into account the factors we have outlined at 24.6. However, the overall lack of due diligence was in separating out the trial of the McKees and the trial of the Atkinsons and Kenneth Hanvey. In our view, to use DCS McBurney's phrase, they were "inextricably linked" and they should all have been tried together. It was also a mistake, in our view, to give priority to using RC Atkinson as a witness in the trial of Hobson, who was only convicted of the minor offence of affray, rather than exposing the conspiracy, which might have led to a better outcome in relation to the murder case.

Submissions by the Public Prosecution Service

The developments in the investigation in 2000-2001

1. On 22 June 2000 the Chief Constable (Sir Ronnie Flanagan) telephoned the Director in relation to the Robert Hamill case. Neither the Chief Constable nor the Director can specifically recall this conversation (W/S of Sir Alasdair Fraser, [82042], §37; evidence of Sir Ronnie Flanagan, 10.9.09, Day 61, p267). The Chief Constable did not make a written record of the conversation. The Director's note of the conversation records that he was told that *"Mr McBurney had now interviewed the relevant police officer and he had 'changed his story'. Contact had been made with the Independent Commission for Police Complaints and further enquiries would ensue."* ([18977]). This information was plainly inaccurate. By the time of this conversation, Andrea McKee, not R/Con Atkinson, had in fact been interviewed, and as a witness rather than as a suspect. This was a fact the Chief Constable was apparently unaware of at the time of the conversation with the Director (evidence of Sir Ronnie Flanagan, 10.9.09, Day 61, p268). The only salient point for present purposes is that it was at this juncture, in mid-June 2000 and after the re-interview of Andrea McKee, that the ODPP became aware of any developments in the investigation into R/Con Atkinson. During his conversation with the Chief Constable, the Director gave Raymond Kitson as a point of contact within the ODPP.

2. A meeting was subsequently arranged between Mr Kitson, DCS McBurney, DI Irwin and Mr Reid of the ICPC on 26 June 2000 to discuss the developments in the investigation. DCS McBurney explained the position in relation to Andrea McKee's change of account and the fact that this had been recorded in a witness statement rather than in a caution statement. He sought Mr Kitson's advice on two issues: (1) whether he was right to have taken a witness statement rather than caution statement from Andrea McKee and (2) how to proceed with the investigation in relation to Michael McKee. Mr Kitson's note records his responses ([17626]-[17627]):

"I indicated to Detective Superintendent McBurney that it was not for me to say whether he was right or wrong to have taken a witness statement from Andrea McKee. It seemed to me that she had, at the very least, committed an offence of doing an act with intent to pervert the course of justice. However, I noted what he had said as to why he had decided to go down the witness statement route. The matter would need to be reported to the Director. Further consideration would be given to any issues which flowed from the decision not to take a caution statement from her.

In relation to Michael McKee this was a matter upon which it was not for me at this stage to advise police. It seemed to me that, in the first instance, further enquiries had to be carried out in regard to Andrea McKee's statement with a view to ascertaining whether there was objective supporting evidence for what she was asserting. I assumed that this would have been the normal course for a police investigation to follow before other potential suspects were interviewed, whether as witnesses or under caution. It seemed also to me that, while it could be argued Andrea McKee was not part of the original conspiracy by Atkinson and Michael McKee and that she had been prevailed upon by her husband to support him in his story, Michael McKee was central to the conspiracy and should be regarded by police in that light. I indicated that these were serious offences which Michael McKee and Constable Atkinson had committed, if the allegations made by Andrea McKee were correct. The matters, in any event, would have to be reported formally, via RUC Headquarters, to the Director's office. I was not prepared at this stage, nor did I have the authority to do so in any event, to determine the question of some sort of immunity, in advance, from prosecution of Michael McKee or any others.

Detective Superintendent McBurney agreed that there were other enquiries to be carried out based on Andrea McKee's statement. These would take some time. No further steps would be taken to interview in any fashion any of the others until those enquiries had been carried out. Superintendent McBurney's preliminary view was that Andrea McKee was in a different position to Michael McKee and that Michael McKee should be interviewed, after caution.

Mr xxxxx on behalf of the ICPC stated that he could understand the desirability for police to look further into matters to support Andrea McKee's statement. He was concerned, however, as to the time that police had indicated that these enquiries would take. In particular, enquiries in relation to further telephone calls made to any of the Hanvey household would take some considerable time. However, he agreed on the general approach.

The meeting concluded on the basis that it was for police to carry out further enquiries as suggested by them. Police would keep me informed of developments. In the meantime I would give further consideration to the questions of immunity from prosecution of Michael McKee. I

indicated, however, that my views may not change. I undertook to mention it to the Director or, in his absence the Deputy Director."

3. As Mr Kitson explained in his statement to the Inquiry, the issues which had been raised were *"investigative questions for the police. They were not matters upon which the ODPP could or should give advice at this stage of the process. In particular, questions of immunity from prosecution (which is effectively what was being canvassed) could not be decided in advance of the receipt of a written submission from police. A decision to treat an accomplice as a witness, rather than to prosecute, was a matter which required the Director's approval, and it could never be resolved without the relevant evidence being available."* (2nd W/S of Raymond Kitson, [82114], §92).

4. The Director concurred with this in his statement to the Inquiry: *"My opinion is that Mr Kitson was not being difficult in terms of asking the police for something in writing in regards to the advice they were seeking. They were clearly skirting in or about the issue of immunity for Andrea McKee, for which Mr Kitson had no authority. Mr Kitson was aware that any issue of immunity was mine to deal with."* (W/S of Sir Alasdair Fraser, [82043], §40). Moreover, the question of immunity could not be considered in an entirely prospective manner as it would be necessary for the prosecutor to be satisfied that the suspect had made a full and honest account of what had occurred and consideration would have to be given to whether they would maintain that account, whether any pressure would be brought to bear on them and whether the police believed the account to be accurate (W/S of Sir Alasdair Fraser, [82043], §41). As the Director also made clear, had his office been approached in advance of the taking of a statement from Andrea McKee, it is quite possible that some advice may have been given as to whether or not that statement should be taken under caution (as distinct from the question of how she would eventually be treated) (W/S of Sir Alasdair Fraser, [82043], §39). In the event, the issue was raised only after the statement had in fact been taken.

5. Mr Kitson and the Police subsequently met on a further two occasions in relation to the ongoing investigation. On 5 December 2000, Mr Kitson was asked to attend a meeting which was already taking place between the Police and PONI. The question of how to use Andrea McKee's evidence against R/Con Atkinson and others was raised. Mr Kitson explained that those issues could only be decided by the ODPP once it was in receipt of the file, so that any decision as to whether to use her solely as a witness (i.e. to give her immunity) or to prosecute her first and thereafter use her as a witness, was taken in light of all the information and weighing all the public interest factors (2nd W/S of Raymond Kitson, [82115], §94; [16673]).

6. On 28 February 2001 a further meeting was held between Mr Kitson, the Police and PONI at which the treatment of Andrea McKee was again raised. Mr Kitson again explained that the ODPP could only take a decision on this once a file had been received, and that in the meantime it was a matter for police as to how they treated Andrea McKee during the investigative stage. Both Colville Stewart and K confirmed in evidence that that was their

understanding of the division of functions at that juncture (3.3.09, Day 56, pp158-9; 8.9.09, Day 59, p86). The Police and PONI were at that time of the view that the appropriate course would be to prosecute her for her part in the conspiracy and then use her as a witness, in order to strengthen her credibility (2nd W/S of Raymond Kitson, [82116], §95; Evidence of K, 8.9.09, Day 59, p86). It was with that recommendation that the file against Andrea McKee was submitted on 12 June 2001 (2nd W/S of Raymond Kitson, [82116], §95). Thereafter, final decisions were taken by the ODPP as to the treatment of Andrea McKee, in light of the entirety of the evidence and with a full oversight of the public interest factors.

7. It has been suggested that the ODPP should have provided advice or directed the Police in relation to the final status which Andrea McKee would have in any prosecution prior to the submission of the investigation file. The PPS strongly rejects any such suggestion. Firstly, it fails to recognise the important division between the investigative and prosecutorial functions, on which see further, above. But secondly, and more specifically, any advice or direction given prior to receipt of the investigation file would necessarily have been predicated upon only partial information. What was required was a full appreciation of the evidence in the case, and the respective roles of the parties to the conspiracy. Absent that, any decision on whether to treat Andrea McKee solely as a witness, or as a defendant first and thereafter as a witness, would have been ill-informed.

The prosecution of the McKees

8. In August 2001, Raymond Kitson directed that Andrea and Michael McKee should be prosecuted for conspiracy to pervert the course of justice ([22917]). It was expected that, thereafter, Andrea McKee would be the principal prosecution witness against the Atkinsons and Thomas Hanvey. As the Police had identified, prosecuting her for her part in the offence would maximise her credibility as a witness and avoid exposing her to the allegation in cross examination that she had fabricated her account in order to secure her own immunity from prosecution. There is no warrant for the suggestion in Inquiry Counsel's Closing Submissions that this was a decision taken without due diligence. There is no aspect of the decision making process which has been identified as inadequate. On the contrary, it is apparent that considerable time and thought was expended on the question of how to treat Andrea McKee from an early stage. As the Director acknowledged in his statement to the Inquiry, questions of immunity and accomplice evidence had been a regular issue for the ODPP, not least through the "supergrass" trials of the 1980s (W/S of Sir Alasdair Fraser, [82044], §42). The rationale for prosecuting Andrea McKee first, then advancing her as a witness who had nothing to gain by giving evidence against her fellow conspirators, was unimpeachable.

9. During the evidence, questions were also put to ODPP witnesses about whether the Atkinsons and Thomas Hanvey should have been prosecuted alongside the McKees. This overlooks the fact that the evidence of Andrea McKee, along with her and Michael McKee's convictions, would form the crux of the case against the Atkinsons and Thomas Hanvey. That evidence

could only be secured by prosecuting and convicting (in the event, on their pleas) the McKees, before instituting proceedings against the remainder of the conspirators. As Mr Kitson explained in his statement to the Inquiry, *"Before Atkinson could be prosecuted it was going to be necessary to have the evidence of Andrea McKee in an admissible form. It was therefore necessary to co-ordinate the timing of the prosecutions so that the prosecution of the McKees would be concluded before it became necessary to adduce the evidence of Andrea McKee in the prosecution of Atkinson and others."* (2nd W/S of Raymond Kitson, [82117], §98). Michael Matthews, who was then an Assistant Director in the Special Cases Section of the ODPP, commented in his statement to the Inquiry that he could *"see the sense of clearing the case against the McKees, as Andrea was going to plead guilty, and then proceeding to deal with the others."* ([80769], §6).

10. Inquiry Counsel's Closing Submissions also raise a question as to whether the decision not to defer Andrea McKee's sentence until after she had given evidence against the other conspirators was taken with due diligence. No particular aspect of the decision making process is identified as deficient and, in the PPS's submission, the suggestion is without any foundation. The issue of when to sentence Andrea McKee was the subject of thorough and documented consideration by the ODPP, which included seeking the advice of senior counsel. As Mr Kitson records in his statement to the Inquiry ([82117]-[82118], §§100-102):

> *"On 31st January a consultation took place with Carl Simpson QC who had been instructed to prosecute in the McKee case [22875]. Also in attendance were Mr Matthews (PPS), DCS Colville Stewart, DCI K and DS H. Andrea McKee's intention to plead guilty and give evidence for the prosecution in Atkinson and others was explained to Mr Simpson. … A question was raised whether Andrea McKee should be sentenced immediately upon her plea of guilty, or whether sentence should be adjourned until she had given evidence in Atkinson and others. Carl Simpson advised that it was the invariable practice in this jurisdiction to proceed immediately to sentence. He did not consider it appropriate for a defendant to plead guilty and then have sentence deferred on the basis that he or she would be willing to give evidence for the prosecution in a future case against co-defendants. He said that this approach was supported by authority.*
>
> *This was my experience. There were good reasons to sentence immediately. If sentence were deferred it could always be argued that the witness had a motive for giving evidence, namely to secure a reduction in sentence. If he or she had already been sentenced, then this motive was more difficult to attribute. In any event, it had become the settled practice in this jurisdiction and I saw no reason to disagree with senior counsel's view that it was the appropriate course here.*
>
> *I recall that Mr Colville Stewart expressed a contrary view at the meeting, and he followed this up with a letter on 11th February 2002 urging me to reconsider the issue. I considered the points made in his*

letter but in the end I decided to adhere to the view I had already formed."

11. The decision not to seek a deferral of Andrea McKee's sentence was predicated on the same rationale as the decision to prosecute her in the first place: namely, to deal with her wrongdoing first and fully, so as to be able to present her to the court with maximum credibility as a witness against Atkinson and others. As Carl Simpson QC put it in his statement to the Inquiry, it was *"neither appropriate nor desirable and in any event the evidence would be weakened by the fact it could be linked to their future punishment"* ([81169], §3). Equally, Michael Matthews observed: *"The issue of deferring the sentencing of Andrea McKee for her to give evidence was raised. I can state clearly that there was no such practice in Northern Ireland and certainly not in my experience. I'm aware that PONI advocated that but it was not considered appropriate. Carl Simpson QC advised to that effect."* ([80769], §6). In the PPS's submission, there is nothing in the process or the decision which justifies any criticism. It is apparent that Andrea McKee remained a willing witness after being sentenced and it has not been suggested that, had her sentence been deferred, the outcome of the prosecution of Atkinson and others would have been any different.

28 The remaining question is whether the decision to discard Andrea McKee as a witness was reached with due diligence. The starting point may be to assess what degree of diligence was required. The relevant factors may be the importance of the charges and the fact that, in practical terms, there was no oversight of a decision which had the effect of the prosecution being discontinued. Although the Attorney General had a power to intervene, that power was essentially never used.

Submissions by Arthur J Downey Solicitors (Andrea McKee)

We agree

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see our comments at 24.6 above. After the highly irregular warning he had received from the DPP (4.177), the Attorney general was hardly likely to intervene.

Submissions by the Public Prosecution Service

1. The overarching question posed by Inquiry Counsel at §28 is whether the decision to discard Andrea McKee as a witness was reached with due diligence. The remainder of §28 and §§29-32 go on to pose a series of specific questions which are said to be relevant to that issue. This part of the PPS' response addresses all of the issues arising out of the discontinuance of the Atkinson and others prosecution and encompasses many of the specific points raised by Inquiry Counsel. In so far as it is necessary to do so, this part of the response then separately addresses the questions posed in §§28-32.

The context of Andrea McKee's evidence

2. Andrea McKee was the principal prosecution witness against Atkinson and others. It has not been, nor could it realistically be, suggested that the prosecution could have proceeded without her. In those circumstances, the only issue is whether the decision not to rely upon her evidence was attended by due diligence.

3. From the outset, it must be recalled that Andrea McKee was a witness whose credibility was already damaged by the fact that she was an accomplice witness where the essence of the offence in question demonstrated a propensity to lie. As the Director subsequently noted, *"a judge would inevitably have exercised his discretion to warn the jury to exercise caution before acting on the evidence Andrea McKee without supporting independent evidence."* (W/S of Sir Alasdair Fraser, [82046], §48) *"almost of necessity, cases of this type are fragile"* (evidence of Sir Alasdair Fraser, 18.9.09, Day 66, p122).

The events leading up to the discontinuance on 19 March 2004

4. On 21 October 2003, in advance of the mixed committal then listed to begin on 27 October, Ivor Morrison and Christine Smith consulted with Andrea McKee in Wrexham. It was the view of both Mr Morrison and Ms Smith that Andrea McKee was a plausible and willing witness, who was able to relate her evidence without reference to her statement and with minimal variation (W/S of Christine Smith, [81925], §5; W/S of Ivor Morrison, [82015], §6).

5. On 27 October 2003 Andrea McKee attended Craigavon Courthouse for the first day of the mixed committal. In the event, the committal did not proceed following a defence application to adjourn so that the matter could be heard by a full-time Resident Magistrate, rather than by a Deputy (W/S of Ivor Morrison, [82015], §7).

6. The hearing was re-listed for 22, 23, 29 and 30 December 2003, on the basis that Andrea McKee would attend on 22 December (in the hope, but with no guarantee, that her evidence would last only one day) (W/S of Ivor Morrison, [82015], §8). Andrea McKee did not attend as arranged on that day. The key events surrounding her failure to attend are at the crux of the issues raised by Inquiry Counsel's Closing Submissions and are set out in the table below in chronological order:

Date	Event
1.12.03	Andrea McKee ("Andrea McKee") sees Dr xxxxxxx with her son, who diagnoses him with an ear infection and possible mumps and gives appropriate treatment (1st W/S of Dr xxxxxxxx, [34042]; Strathmore Surgery Records, [74255]).
Early	Andrea McKee contacted by DC Murphy to make travel arrangements for

Dec 03	committal hearing (HOLMES summary of enquiries, [58454]).
11.12.03	Dr xxxxx visits Andrea McKee's son at home, diagnosing an ear infection and possibility of mumps and prescribing antibiotics (2nd W/S of Dr xxxxx, [34043]).
19.12.03	DC Murphy contacts Andrea McKee to confirm final travel arrangements. Andrea McKee does not mention that her child is sick (W/S of Patricia Murphy, [81878], §15).
21.12.03	Andrea McKee contacts Armagh police to say that she will not be able to attend court the following day because her son is ill (HOLMES summary of enquiries, [58454]). DC Murphy contacted by K and asked to speak to Andrea McKee to see if they could assist in any way, and to clarify with her what illness her son had, what treatment he was having, the date/time he was last seen by a doctor, details of the doctor consulted, contact details for the doctor and a prognosis (W/S of DC Murphy [59788]; Journal Entry of K [59858]). DC Murphy speaks to Andrea McKee who says that her son has mumps and ochtitis, which she explains is swollen tests. She further stated that there was a fear he could have a fit due to his high temperature. She explained that the child's illness had started two weeks ago with an ear infection and since then he had seen the doctor twice at the surgery and once at home and he was to see the doctor again the following day. She stated he had been prescribed Amoxicillin and Calpol by Dr xxx from Strathmore Surgery. She said she definitely could not attend on 23.12.03, and would have to say no to attending the following week because she wouldn't know whether her son would be better (W/S of DC Murphy [59788], §17; Journal Entry of K [59858]). K directs that J inform Ivor Morrison of this development. DC Murphy to attend Court the following day to brief the Crown Prosecutor and Court. J to obtain medical reports.
22.12.03	Andrea McKee attends Strathmore Surgery in the morning with her son. The file records: *"Child presented with otitis media* [inflammation of the middle ear] *and persistent glands in neck – review if doesn't settle – query for bloods – prescription for Penicillin Elixir given."* The doctor is Dr xxx. (HOLMES summary of enquiries, [58454]; 1st W/S of Dr xxxx, [34042]; Strathmore Surgery Records, [74255]). The committal proceedings at Craigavon Courthouse are adjourned because Andrea McKee has not attended. Mr Morrison and Miss Smith are both present and are told of the reasons for non-attendance by DC Murphy (mumps, ochtitis, and a high temperature causing a risk of fitting). Those reasons are relayed to the Court. The case is listed for mention on 2.1.04 when the prosecution is to produce medical evidence relating to the child, in the anticipation that the substantive proceedings would recommence on 8.3.04. (W/S of Ivor Morrison, §9; W/S of Christine Smith, §§8-9; [34061]; Christine Smith, 10.9.09, Day 61, p71; Ivor Morrison, 17.9.09, Day 65, pp17-19). J is instructed to obtain a medical report from the GP re ill-health and ongoing medical treatment of Andrea McKee's child (Journal Entry of K [59860].

23.12.03	Andrea McKee first contacts police to say that she had received a letter, purporting to come from LVF, threatening her if she gave evidence (HOLMES summary of enquiries, [58455]).
24.12.03	Police obtain a statement from Dr xxxxx at Strathmore Surgery who confirms that he saw Andrea McKee's son on 1.12.03 and that Dr xxxxx saw him on 22.12.03. He sets out the diagnosis on each occasion ([34042]).
29.12.03	Dr xxxxxxx's statement of 24.12.03 is faxed to Ivor Morrison (W/S of Ivor Morrison [82016], §10).
30.12.03	H contacts Andrea McKee re the medical treatment received by her son. She gives two further pieces of information: 1. That Dr xxxxx had conducted a home visit on 11.12.03 and prescribed antibiotics and nose drops. 2. That on Friday 19.12.03 she had telephoned the Pendine Park out of hours clinic at night because of her son's high temperature. She was told to give him Calpol and phone back in 30minutes. She did this and as the child's temperature had not come a down she and her partner had taken him to Pendine Park clinic where they saw a lady doctor. H asks Wrexham CID to call Dr xxxx and Pendine. (HOLMES summary of enquiries, [58455];Typed N/B of H [59899]) Police take a 2nd statement from Dr xxxxxxx at Strathmore Surgery, which confirms that he made a house visit to Andrea McKee's son on 11.12.03 and prescribed antibiotics for an ear infection and possible mumps ([34043]). This is faxed by DC Kevin Whitehead to the PSNI (H) at 16.51, apologising for the delay and noting that *"re the statement from Pendine GP office – the afternoon staff will visit when they open at 6pm tonight – and fax and relevant statement to you."* ([34055]) The police note in the HOLMES Summary that there is no record of the 11.12.03 home visit at Strathmore Surgery, although the Doctor confirms it occurred ([58455]). A typed note from DC Kevin Whitehead sets out instructions to officers to attend Pendine to take a statement. It has a handwritten note at the bottom of it dated 31.12.03 which instructs officers to fax a copy of the statement from Pendine, once obtained, to Ivor Morrison at the DPP ([34052]).
31.12.03	At 10.15am DC Whitehead faxes H to inform him that the late turn officers had been unable to visit Pendine overnight, but would attend tonight and fax a statement through asap ([34057]). Police take a statement from Dr xxxxx at Pendine who confirms that no calls were received from Andrea McKee on behalf of her son from 6pm on 19.12.03 to 8am on 20.12.03 (W/S of Dr xxxxx [59854]). At 18.50 Dr xxxxx' statement is faxed to Ivor Morrison with a note saying that Dr xxxxxxx can find no record, but "*if the date is wrong that would be different matter. In addition caller may have phoned NHS Direct.*" ([34051]) H contacts Andrea McKee again but she remains adamant that they went to

	Pendine out of hours clinic. DI H relays this to DC Whitehead and also speaks to Ivor Morrison re the same (HOLMES summary of enquiries, [58456]; Typed N/B of H [59899]).
1.1.04	Wrexham CID attend Pendine and check records for the whole of the weekend commencing 19.12.03 and find no record of Andrea McKee contacting or attending the surgery that weekend/any home visit. The on call locum doctor has been spoken to and there is no trace of records for Andrea McKee. DC Whitehead faxes H to this effect, and asks whether it is possible she has her weekends mixed up (HOLMES summary of enquiries, [58456]; Fax from DC Whitehead to H [34041]).
2.1.04	The case is mentioned at Craigavon Courthouse. Mr Morrison attends for the Prosecution. Christine Smith is not present. The issue of the outstanding medical evidence in relation to Andrea McKee's non-attendance is not resolved and the matter is further adjourned (W/S of Ivor Morrison, [82018], §13).
9.1.04	A consultation takes place between Andrea McKee, Christine Smith, Ivor Morrison, H and K in Wrexham to assess the position in relation to the threatening letter and consider the evidence concerning her child's ill-health. K directs that, as a result of the meeting and discussions with Ivor Morrison, a number of further investigative steps be taken about the letter and in relation to potential witness protection (Journal Entry of K, [59863]). Andrea McKee is asked by Ms Smith to go through the history of her son's illness. She does so, starting from the beginning of December 2003. She gives a further account of the Pendine visit: Andrea McKee or her partner had phoned Strathmore Surgery and had been re-directed to Pendine automatically. The phone call was quite late – after 11pm. Her partner spoke to someone who told him to give the child Calpol and said they would phone back in an hour. A lady doctor phoned back and spoke to Andrea McKee. Of going to the surgery itself, she says that "*the receptionist was female, there were not many people there, they were waiting for us, went in, doctor said bring him through – male doctor – can't remember name. He felt round his neck, listened to his chest, said to keep giving him Calpol, if no improvement go back to own doctor.*" Later she says, *"At Pendine surgery, I was carrying [son] xxxxxx spoke to receptionist. Receptionist could have been person I spoke to on phone. Doctor opened door – old – grey hair. Didn't see receptionist making notes, she could have done. Doctor didn't take any notes when we were there."* (Note of Christine Smith, [33991]-[33997]). K records that a DI is asked to continue enquiries at Pendine to identify the doctor and receptionist/nurse on duty on nights of 19 and 20 December who can confirm that Andrea McKee presented her son for consultation and treatment on that date (Journal Entry of K, [59863]).
26.1.04	A statement is taken from xxxxxx, receptionist at Pendine, who confirmed that she checked the records for an attendance in Andrea McKee's son's name for the dates 10-20 December 2003 but found no trace whatsoever

	(1st W/S of xxxxx dated 26.1.03 [59837]).
4.2.04	H speaks to Wrexham CID who inform him that on night of 19.12.03 there were 2 Asian doctors and one dark-haired male on duty, no grey-haired doctor. Wrexham were to check the position re 20.12.03 that day. (Notebook of H [59901])
9.2.04	Statements are recorded from Dr xxxxx, Dr xxxx and Dr xxxx who were on duty at Pendine overnight from 19-20.12.03, none of whom have any memory of seeing Andrea McKee's son. Dr xxxx also states that all calls to the surgery for advice or consultation are recorded. Written records are kept of all attendances and scanned into a computer database at the surgery. Carbon copies of call sheets are sent to the patient's usual GP. *"As such it is unlikely that a patient would be seen at the centre without some record being available."* xxxxxxxxx, the receptionist, makes a 2nd statement setting out the procedure at Pendine and confirming that she has checked the entire records for December and cannot find anyone with the surname [McKee/xxxx] (W/S of Dr xxxx [59846]; W/S of Dr xxxx [59845]; W/S of Dr xxxx [59847]; 2nd W/S of xxxxx dated 9.2.04 [59835]).
13.2.04	Ivor Morrison writes to Gerald Simpson QC to arrange a consultation between the Police, the ODPP and Counsel ([33984]).
17.2.04	A meeting takes place between Gerald Simpson QC, Christine Smith, Ivor Morrison, H, K and J. Both the threatening letter and the further inquiries into the Pendine issue are discussed. K's note records: "*On the evidence collated to date, the information gathered from these enquiries does not appear to corroborate or substantiate her account of bringing her sick child to the out of hours Doctor on 19/20.12.03. It was agreed that we should speak further with Andrea McKee to establish if she can explain or clarify these discrepancies, before deciding how the prosecution should move forward in light of these developments which are relevant in determining her credibility as a prosecution witness. This matter will be prioritised as a matter or [sic] urgency – further meeting arranged for next Wednesday 25.2.04 prior to Court proceedings at CMC on 27.2.04."* (Journal Entry of K [59876]).
18.2.04	K speaks to H and J re further enquiries about Andrea McKee's account for 19/20.12.03; H speaks to Andrea McKee, who maintains her account; H relays this to Ivor Morrison. The note records: *"DC J to begin preparing report for the information of the DPP which outlines investigative enquiries and findings surround (1) The threat letter addressed to Andrea McKee (2) The ill-health of Andrea McKee's son which necessitated her being unable to attend court on 22.12.03. Briefed by ADI H regarding his telephone discussion with Andrea McKee on this date – refer to notes made by ADI H. As a result of Andrea McKee's responses to further questions which were put to her about visiting the Out-of-Hours Doctor on 19/20.12.03 in which she remains adamant that she did attend the Pendine Surgery, it was decided that there was nothing further to be gained by travelling to Wrexham to interview her at this stage. ADI H briefed Mr Morrison of the DPP regarding his telephone*

	discussion with Andrea McKee and our subsequent decision not to travel back to Wrexham to interview her at this time." (Journal Entry of K [59877])
19.2.04	K briefed by H re analysis of further phone material which contains nothing to corroborate Andrea McKee's account that she had contacted the on-call doctor on 19-20 December 2003. *"ADI H to brief Mr Morrison"* (Journal Entry of K [59878]).
20.2.04	K briefed by H re another conversation with Andrea McKee, which is then relayed to Ivor Morrison and PONI: *"Briefed by ADI H re: telephone discussion he had with Andrea McKee yesterday evening – Husband is not able to assist with regard to identifying any matters or providing any further information which would corroborate or substantiate their visit to the Pendine Surgery out-of-hours on Fri 19-Sat 20 December 2003 – refer to notes of ADI H b/p date to be relayed to Mr Morrison who is also able to confirm details of a meeting proposed for next Wednesday to discuss, with Counsel ahead of next Friday's court proceedings, the legal implications which have arisen in consequence of the enquiries made in respect of Andrea McKee's account that she attended an emergency out-of-hours Doctor's Service with her sick child on 19/20 December 2003 as directed by the Court and the Prosecutor during previous preliminary court proceedings on this matter which have sought to examine why Andrea McKee has unable to attend committal proceedings at CMC on 22 December 2003 to give evidence. Mr Mehaffey of PONI to be briefed and updated by me as to these developments ahead of a further meeting with Counsel and DPP proposed for next Wednesday – In his capacity as the PONI representative who has been supervising this investigation. Mr Mehaffey will be invited to attend next week's meeting."* (Journal Entry of K [59879]).
25.2.04	A meeting takes place between Gerald Simpson QC, Ivor Morrison, Christine Smith and the Police to consider problems that had arisen in relation to the evidence surrounding Pendine, and the difficulties being experienced in relocating Andrea McKee for the purposes of witness protection (Christine Smith's letters re fees [33865], [33867]).
26.2.04	A meeting takes place between the Director, the Senior Assistant Director, Ivor Morrison, Gerald Simpson QC and the Police. Mr Morrison's note ([33979]) records that there was: *"serious doubt about Andrea McKee's truthfulness regarding the alleged visit to the clinic. There is also concern about the significance of her receipt on Tuesday 23 December of a threatening letter relating to her attendance as a witness in this case. It was also known that Andrea McKee had attended a medical examination on 23 December in connection with her admission to a nursing course and that her desire to attend this examination may have influenced her attitude towards attending court in Northern Ireland the previous day.* *Mr Simpson expressed the view that Andrea McKee was not credible on the question of whether or not she attended the clinic on 19 December. While there was no reason to doubt that she was telling the truth about the main issue on which she was expected to give evidence for the Crown, her credibility as a Crown witness would nevertheless be damaged.*

	The Director said that he had to be sure that he had taken every proper step to advance the case and he expressed the view that in all the circumstances Andrea McKee may remain credible on the main issue. It was important that he should take an informed decision on how the case may be progressed in accordance with the directing test. He noted that Junior Counsel, Christine Smyth and Mr Morrison had conferred with the witness but that Senior Counsel, Mr Simpson had not yet seen the witness. *He requested that Mr Simpson now confer with the witness and provide written advices as to whether she can be presented as a credible witness.* *He directed that a police officer should attend the consultation to record a statement as to what the witness had said. The consultation should take place as quickly as possible."*
27.2.04	Ivor Morrison attends Craigavon Courthouse and applies to adjourn consideration of the evidence in relation to the 22 December 2003 adjournment and for the 8 March 2004 committal date to be removed from the list. Mr Morrison explains that satisfactory evidence has not yet been obtained for all the circumstances which the prosecution had relied upon on 22 December. Defence counsel/solicitors resist the adjournment on the basis that it appeared that Andrea McKee had lied about the reasons and the evidence to date only showed the child to have an ear infection. The Resident Magistrate indicates that he considers the situation to be most unsatisfactory, that it appears the court has previously been misled, and granted an adjournment to 19 March 2004, when there would have to be some finality ([33913], §§31-32).
2.3.04	Gerald Simpson QC consults with Andrea McKee. Ivor Morrison, DC xxxxx and DC Murphy are also present. A Police note ([33961], [33965]) records Andrea McKee being asked by Gerald Simpson QC whether there was any chance she had not gone to Pendine, which she denied repeatedly. She is also questioned about the grey haired doctor who she said had examined her son, there being no doctor at Pendine who fitted that description. Mr Simpson QC records in his subseqeut advice: *"Ms McKee described the doctor who, she says, saw the child as being a male doctor with grey hair. None of the duty doctors fit that description. When asked about this at the consultation she sought to explain away this matter by saying that it was not she who took the child in to see the doctor, but her partner. She says that she waited in the reception area and may have mistakenly thought that the person who called her partner and the child in was the doctor. This is in direct conflict with her version of events when spoken to on 9th January when she told those who consulted with her that she had been present when the doctor examined the child. She specifically stated that the doctor was old with grey hair."* ([33917], §12).
16.3.04	The ODPP receives Gerald Simpson QC's advice in which he concludes ([39915]): *"Unless the whole system of dealing with, and recording visits of, patients at Pendine Park is fatally flawed; unless all the doctors were mistaken about her attendance; and unless the available telephone records are incomplete then the inevitable conclusion is that Ms McKee has concocted*

the story about taking the child to that surgery. That is the view that I take having consulted with her about the matter. She is able, and quick, to think of apparently plausible explanations for apparent problems when they are pointed out to her (e.g. her present explanation for the non-existence of the old, grey-haired doctor as contrasted with her original version of the visit.)

I offered her an opportunity to admit that her story was untrue and to give us the true explanation. She maintained that the version she had give was true.

There remains the issue about the letter which she received. The provenance of this letter is, at of this date, unknown. There is suspicion that the letter was not sent by persons ill disposed to her, but that she was aware it was coming and might have been expecting it to arrive during the relevant weekend, thus giving her a reason for not coming. In the event the letter did not arrive until the Monday. However, the matter remains unresolved and I have not taken into account, one way or the other, in coming to my decision.

The original advices in this case were given at a time when none of these issues had arisen. Ms McKee had been convicted, on her plea, of an offence of doing an act with intent to pervert the course of justice. In the trial of the above defendants she would be the principal witness as to fact and her evidence would have to be treated as that of an accomplice. Accordingly, her credibility is of central importance.

In the circumstances of this case the prosecution will be called upon to explain the adjournment which resulted from her non-attendance on 22nd December. The explanation given by Ms McKee is untruthful in my view in the light of the police enquiries. It would be inappropriate to put this version of events forward knowing that, as will inevitably happen if she goes into a witness box, she will give untruthful evidence.

The overall effect of her maintenance of the story, for which there is not a shred of corroboration, is to contaminate any evidence that she may give and completely to undermine her general credibility.

In those circumstances, I am not in a position to advise that she can be put forward by the prosecution as a witness capable of belief."

Mr Morrison writes to the Director in the following terms ([33919]):

"It is my view from what transpired at this consultation and from the second two previous consultations I have attended with Andrea McKee in Wales, that she has been untruthful and has invented facts when she has felt that this course of action would suit her own purposes. … While the Pendine Park issue is not a matter which is directly relevant to the essential evidence in the prosecution of Atkinson, Atkinson and Hanvey, it provides a basis upon which the defence will attack her credibility which, without doubt, will be critically damaged.

	The prosecution depends upon the evidence of Andrea McKee, not only to prove that the present defendants committed the offences alleged, but also to prove that the offences were committed at all. In view of the threadbare state of her credibility there is no longer a reasonable prospect of convicting any of the defendants of the offences with which they are charged. In reaching this conclusion I have also considered whether there is any possibility of proceeding with the case without calling Andrea McKee as a witness. It has always been clear that she was the key witness in this case. Without her testimony there is not a shred of evidence upon which the defendants could now be convicted. … *If you accept the advice of Mr Simpson, which is consistent with earlier advice given by Christine Smith BL, and with my views expressed above you will wish to discuss the exact terms of the information which should be provided to the court."*
18.3.04	Ivor Morrison writes to Kevin McGinty in the AG's office providing him with copies of Gerald Simpson QC's advice and his own memo to the Director dated 16 March 2004. He states that *"A history of the case will follow later this morning."* ([33949]). Mr Morrison subsequently forwards the case history he had prepared ([33909]). The Director writes to Kevin McGinty in the AG's office referring to the Summary of Events prepared by Mr Morrison, the advice of Gerald Simpson QC and the memo of Mr Morrison dated 16 March and stating that: *"Having regard to Senior Counsel's advices and to the facts and information available, I am minded to conclude with Senior Counsel's advice that it would not be appropriate to put forward a version of events to the court knowing that, as will inevitably happen if she does into the witness box, Ms McKee will give untruthful evidence. I also agree that the overall effect of her maintenance of the story, for which there is not a shred of corroboration, is to contaminate any evidence that she may give and to undermine her general credibility. As there is no other evidence available, I am minded to offer no evidence before the Resident Magistrate on 19 March. Can we discuss?"* ([33908]) Mr McGinty writes to the AG ([40221]), enclosing the documents sent to him by the Director and noting, in relevant part: *"The key issue is whether, just because McKee has lied about why she didn't turn up on 22nd December, she may still be telling the truth about the main issue at trial. I accept that one untruth does not necessarily mean that a jury, properly directed, may not believe her evidence – particularly since she has already pleaded guilty to her part in the conspiracy. Of course, when it comes to 'properly directed' there is little that can be said by way of direction about credibility. McKee is the key witness – not only of what happened but the very fact that it happened at all. She is an accomplice and her evidence will have to be given subject to a warning about the dangers or convicting on her evidence without other corroboration. There is no other corroboration. This puts her in a rather*

	different position from the usual run of witnesses. *I think the decision also has to be seen against the background of great concern about the use of accomplice evidence that is the result of the collapse of the supergrass trials in Northern Ireland in the 80s. Further, as you are aware, in Northern Ireland prosecuting counsel meet witnesses in consultation specifically to assess credibility. Senior Counsel in this case, Gerry Simpson QC, is very experienced. He is very strongly of the view that he would not call her as a witness of truth. He offered her a way out of her story in conference but she maintains the lie. That assessment is another factor that is crucial to the decision. (It may surprise you, but I would expect Simpson to decline to appear in the case if it went ahead.)* *I believe the witness would be torn to bits by defence counsel about these issues. They would also raise the letter issue, which although not part of the prosecution's decision, will no doubt be closely examined by the defence."* Mr McGinty rings the Director at home, having discussed the case with the AG. The Director's note of that conversation ([33886]) records: *"The Attorney General noted that Witness A had pleaded guilty to the offence of attempting to pervert the course of justice. I observed that this was a factor which I had weighed. Unlike England and Wales, there was an opportunity in Northern Ireland for counsel to confer with the witness. In this case, I had sought views as to the witness's general credit. It was counsel's clear advice that he could not advance her as a credible witness. I agreed. I noted that in any event that Witness A was an accomplice and that a judge would have to warn the jury about the dangers of convicting without corroboration.* *The Attorney General had indicated that he wished to be in the strongest possible position in relation to defending any decision which I reached. I read to Mr McGinty a prepared statement for the court. Having discussed this with him, I amended it in particular to indicate that the witness's explanation for her failure to attend court on 22 December 2003 is such as to undermine the witness's general credibility in relation to the charges before the court. I subsequently discussed this amendment with the Deputy Director, who was in agreement."*
19.3.04	The charges against Atkinson, Atkinson and Hanvey are withdrawn at Court.

The criticisms made of the ODPP

<u>There was no need to get medical evidence, only a medical certificate</u>

7. It was suggested to ODPP witnesses in cross-examination that the only documentation required to satisfy the Court of the reason for the adjournment

was a medical certificate showing the child to be ill. That suggestion was predicated on the note taken by Ivor Morrison at Court on 22 December 2003. However, as Mr Morrison explained, *"'certificate' was a shorthand way of describing what we would expect to have been satisfactory written evidence."* (Evidence of Ivor Morrison, 17.9.09, Day 65, p19). Christine Smith explained that what was required was *"whatever medical evidence we could produce to establish her child was ill on that date and was suffering from the conditions she described."* (Evidence of Christine Smith, 10.9.09, Day 61, p10; See also, W/S of DC Murphy [59788] and Journal Entry of K [59858], dealing with the evidence which the Police sought to gather).

The evidence which the ODPP had was sufficient to explain the adjournment

8. The adjournment was procured on the basis of the information provided by Andrea McKee on 21 December 2003 that her son had been ill over the weekend of 20/21 December 2003 with mumps, ochtitis (swollen testes), and a high temperature causing a risk of fitting. The medical evidence obtained from Strathmore Surgery did not support this. On the contrary, it showed that:

a. On 1 and 11 December 2003 the child had an ear infection and the possibility of mumps.

b. On 22 December 2003, the day of the hearing, the child had an ear infection and persistent glands in his neck.

9. There was no evidence that the child had either swollen testes or a high temperature, causing a risk of fitting, nor any evidence that he had seen a doctor between 11 and 22 December 2003. The medical evidence simply did not support the account that Andrea McKee had given. It is therefore not correct to suggest that the medical evidence in the possession of the ODPP was sufficient to justify the reasons given for the adjournment.

There was no need to investigate the Pendine issue

10. It has been suggested during the evidence that there was no need to investigate the Pendine issue at all and that the ODPP was in some way responsible for driving this unnecessary investigation forward. The PPS rejects that suggestion for two reasons:

a. It was the Police, not the ODPP, who initiated the investigation into Pendine. The ODPP was not made aware of the Pendine issue until after inquiries had commenced. The sequence of events is as set out in the table above. In short:

- On 30 December 2003, H speaks to Andrea McKee who tells him for the first time that she had been to the Pendine out of hours clinic on the weekend of 19-21 December. H contacts Wrexham Police (Kevin Whitehead) and asks him to call

Pendine. Wrexham Police try to attend Pendine that day, but are unable to do so.

- On 31 December 2003 Wrexham Police take a statement from Dr xxx at Pendine who confirms that there was no contact from Andrea McKee overnight on 19/20 December 2007. At 18.50 the same day, that statement is faxed to Mr Morrison. H contacts Andrea McKee who maintains that she went to Pendine. This is relayed to Wrexham Police and Ivor Morrison.

- On 1 January 2004 Wrexham Police attend Pendine and check the records for the entire weekend. No record is found of any visit. Kevin Whitehead sends a fax to H informing him of this.

H confirmed in his evidence to the Inquiry that it was his decision to instigate the investigation into Pendine following his conversation with Andrea McKee on 30 December 2003 (8.9.09, Day 59, p152). Ivor Morrison confirmed that the investigations had commenced before he was aware of the Pendine issue and that he at no stage had a role in directing what investigations the Police were conducting into it (17.9.09, Day 65, p117).

b. The inquiries into Pendine were a perfectly proper attempt to verify the account of her son's illness that Andrea McKee had given to DC Murphy on 21 December 2003. As Kevin Whitehead confirmed in evidence, the expectation was that they would be acquiring confirmatory evidence to establish that that account was true: it was not (as has been implied during questioning) an attempt to discredit her (7.9.09, Day 58, p12). There was no reason to disbelieve her at that juncture (see, for example, evidence of Ivor Morrison, 17.9.09, Day 65, p117). It is of note that no criticism has been made of the decision to follow up the other piece of additional information H was provided with by Andrea McKee on 30 December 2003, namely that her child had also been seen by the GP on 11 December 2003. Inquiries were made to verify that in precisely the same way as they were into Pendine. From the account Andrea McKee gave to H on 30 December 2003, the visit to Pendine would, if confirmed, have provided solid evidence that her son had been suffering from the high temperature she had reported to DC Murphy less than 48 hours later. This was not an attempt to undermine her; it was an attempt to corroborate her. In the event, there was evidence to support what she had said about the GP visit on 11 December but nothing to support her account about Pendine.

Inappropriate disclosure was made to the Defence on 2 January 2004

11. During cross-examination, it was suggested to Ivor Morrison that he had acted inappropriately in his contact with the Defence at the hearing on 2 January 2004. In particular, it was suggested that he had in some way 'tipped-off' the Defence that there were some doubts about the reasons Andrea McKee had given for not coming to court on 22 December 2003 (17.9.09, Day 65, pp56-65). It was put to Mr Morrison that the letter from Mr Monteith at [33983] suggesting that statements may need to be provided by Mr Morrison and Christine Smith was in relation to some alleged inappropriate disclosure which had been made on 2 January; and that as a result of that letter, Mr Morrison was concerned for his professional position such that it would have been *"easier"* for him if *"this prosecution went away"* (17.9.09, Day 65, pp66, 76). That very serious allegation is without substance or foundation and is categorically rejected:

a. Whilst Mr Morrison cannot recall precisely what information was provided to the Defence on 2 January 2004, there would have been nothing improper whatsoever in him advising the Defence as to the status of the evidence about Andrea McKee's son's health. On the contrary, it would have been improper and contrary to his disclosure obligations if Mr Morrison had led the Defence to believe that there was no difficulty in corroborating Andrea McKee's account (17.9.09, Day 65, p119). In those circumstances, there would have been no reason whatsoever for Mr Morrison to have been concerned about his conduct on 2 January 2004.

b. Contrary to how the issue was put in cross-examination, the letter from Mr Monteith at [33983] was in fact suggesting that Mr Morrison and Miss Smith may have to give statements to cover the *"very firm explanations given to [Mr Monteith] by you and Crown Counsel with regard to the alleged sickness of the Crown Witness's child", "particularly if Mrs McKee … attempts to give a different version."* That must plainly refer to the information provided to the Defence and the Court on 22 December 2003. Miss Smith was not even at court on 2 January 2004. (Evidence of Ivor Morrison, 17.9.09, Day 65, p121).

<u>The proper course was to seek a further statement from the GP after the consultation on 9 January 2004</u>

12. It was further suggested that, if the evidence were insufficient to justify the adjournment, the appropriate course would have been to obtain a further statement from Strathmore Surgery providing more information about the severity of the child's illness, following the consultation with Andrea McKee on 9 January 2004 (see, for example, the questions put to the Director, 18.9.09, Day 66, p53). Inquiry Counsel's Closing Submissions put the issue in a slightly different way:

"The Panel may think that a good test of whether the office of the ODPP was engaged in determining whether Mrs McKee was generally credible, is whether it took steps to direct that a medical report be

obtained from her GP to test what she said about her child's illness. The account given on 9 January 2004 was not checked." (Part 18, §32)

13. Again, put in a slightly different way, the issue is raised as a potential criticism or adverse inference in relation to the Director and Ivor Morrison:

> *"Failed to heed the fact that Mr Simpson QC was unable properly to address the question of whether Andrea McKee could be lying about Pendine, but nonetheless credible about the substance of her evidence, because no steps had been taken to test her account of the child's illness in the period prior to the weekend of 19-21 December."*

14. The PPS makes the following observations:

a. Whilst it is correct that the GP was not further contacted following the 9 January 2004 consultation, it is also right that considerable inquiries had already been made of Strathmore Surgery, including the taking of two statements from Dr xxxxx and the obtaining of the Surgery's records. It is overstating the position to suggest that the account given on 9 January 2004 was not checked at all. It is certainly incorrect to suggest that *"no steps had been taken to test her account of the child's illness in the period prior to the weekend of 19-21 December."* The fact was that extensive inquiries had already been made of the GP, including the taking of statements and the procuring of records, and it is difficult to see what additional information in support of Andrea McKee's account could have been forthcoming.

b. More importantly, and as the Closing Submissions recognise, by this juncture the concern was not simply whether evidence could be obtained which demonstrated the child to be ill in the way described in order to obtain the adjournment, but, crucially, whether Andrea McKee was giving an untruthful account of a type likely to undermine her general credibility. Even if a further statement was obtained from the GP which supported some aspects of what Andrea McKee had said in consultation, she was still maintaining that she had attended Pendine on the very weekend in question. If she had not, she was persisting in a significant, albeit collateral, lie. A further statement from the GP could do nothing to alter that fact and could therefore have had no impact upon Mr Simpson QC's assessment of her credibility. Having been provided with a description of the doctor she said she had seen, it was entirely appropriate that inquiries be made of Pendine to establish whether or not there was a doctor of that description employed there.

<u>The ODPP wrongly concluded that Andrea McKee was lying about Pendine</u>

15. The suggestion was made during the evidence by some of the Interested Parties that Andrea McKee had not been shown to be lying on the Pendine issue. The PPS submits that the evidence, both in 2004 and in 2009, demonstrates that Andrea McKee fabricated her account of a visit to Pendine:

a. On 19 December 2003 Andrea McKee spoke to DC Murphy to finalise travel arrangements. At no stage did she mention her child was ill.

b. On 21 December 2003 DC Murphy took a full account from Andrea McKee of her child's illness and the treatment he had been receiving. Mention was made of seeing the doctor at the GP's surgery and of a home visit, but no mention was made of the alleged visit to Pendine within the previous 48 hours.

c. Pendine itself had no record whatsoever of any contact, whether by telephone or in person, with Andrea McKee or her son, despite there being several different ways in which such contact would be recorded. Equally, no record of any consultation was sent from Pendine to the GP, in accordance with the system in operation at that time.

d. Despite extensive checks of her telephone records, there was no record of any contact between Andrea McKee and Pendine during the period in question.

e. At the consultation on 9 January 2004 Andrea McKee gave an account of taking her son in to the doctor's room, where he was examined by an old, grey-haired, male doctor who felt around his neck and listened to his chest, but did not take any notes. There was no doctor matching that description at Pendine.

f. When the fact that there was no grey-haired male doctor at Pendine was put to Andrea McKee during the consultation on 2 March 2004, she attempted to explain the matter away by saying that she had not taken her child in to see the doctor, but had remained in the waiting room whilst her partner went into the consultation room with the child. That account was plainly irreconcilable with the description she had given of seeing the grey-haired doctor palpate her son's neck, listen to his chest and not take any notes. It would also be surprising that she, as the child's mother and the person who had accompanied him into the surgery previously, would elect for no apparent reason to wait outside during the consultation.

16. During her evidence to the Inquiry, Andrea McKee was confronted with the evidence contradicting her account and could offer no adequate explanation (11.2.09, Day 14, pp139-167). The PPS submits that the only proper inference from the evidence she gave to the Inquiry is that her account of visiting Pendine was false.

<u>The ODPP incorrectly assessed the significance of the lie about Pendine</u>

17. Inquiry Counsel's Closing Submissions suggest that the decision not to rely upon Andrea McKee was reached without due diligence. In essence, it is

suggested that: (a) the ODPP wrongly assessed the significance that the lie about Pendine had on Andrea McKee as a witness; (b) that instead of focusing on the impact such a lie would have on her credibility as a witness, the ODPP/counsel focused on whether Andrea McKee was lying to them; and (c) the fact that Ivor Morrison thought a jury would probably believe that her plea of guilty had been properly entered meant that the test for prosecution was met and the case should have continued, at least to committal. It has also been suggested that the ODPP wrongly assumed that the Resident Magistrate would have the power to halt the prosecution in the absence of evidence satisfying him as to the basis for the adjournment.

18. The PPS entirely rejects these criticisms. The decision not to use Andrea McKee as a witness was taken after thorough and careful consideration by the Director himself, as well as by Mr Morrison, Mr Simpson QC and Ms Smith. The Attorney-General, and Mr McGinty in his Office, had oversight of the final decision, and David Perry QC has independently concluded that it was reasonable.

19. The Inquiry Panel may, of course, form a different view of Andrea McKee's overall credibility from the view that was formed by the ODPP on the evidence before it at the time. That is plainly within the Terms of Reference. The PPS however submits that it is not for the Panel to determine whether the view which was reached by the ODPP was right or wrong.

20. The PPS submits that the issues raised by Inquiry Counsel fall outside the scope of the Terms of Reference, as they concern the merits of the decision to discontinue the prosecution against Atkinson and others. Whilst the Inquiry is entitled to consider whether or not the ODPP properly informed itself of the relevant issues before reaching that decision, the merits of the decision itself fall outside the Terms of Reference, for the reasons set out above. In particular, the PPS notes the ruling of the Chairman during the course of the evidence that the Panel is not entitled to reach a view on the merits of the decision, and is limited to a consideration of whether the ODPP had equipped itself properly in advance of making that decision (18.9.09, Day 66, p111).

21. The issue of the scope of the Terms of Reference as it applies to this aspect of the ODPP's decision-making is further addressed in response to §32 of Inquiry Counsel's Closing Submissions, below.

22. In relation to the substance of the decision, the PPS makes the following specific observations:

The test applied by the ODPP

23. It is incorrect to suggest that the ODPP or counsel failed to recognise that the central issue was Andrea McKee's general credibility, not whether she was lying to them. Inquiry Counsel's Closing Submissions acknowledge that the Director himself recognised that a lie about Pendine was peripheral and therefore may not affect her credibility on the core issue (Part 18, §30). As the minute of the 26 February 2004 meeting records, the Director had an open

mind as to the question of whether she may remain credible on the main issue ([33980]). It was, of course, the Director who was the final decision-maker in this case.

24. But it is also correct to note that the other persons involved in the decision-making process fully appreciated that the central issue was her credibility and whether, in light of the lie about Pendine, that would be fatally undermined. Mr Simpson QC recorded in his advice of 16 March 2004: *"In the trial of the above defendants she would be the principal witness as to fact and her evidence would have to be treated as that of an accomplice. Accordingly, her credibility is of central importance. … The overall effect of her maintenance of the story, for which there is not a shred of corroboration, is to contaminate any evidence that she may give and completely to undermine her general credibility."* ([39915])

25. Similarly, Ivor Morrison's memorandum to the Director upon receipt of Mr Simpson QC's advice records: *"While the Pendine Park issue is not a matter which is directly relevant to the essential evidence in the prosecution of Atkinson, Atkinson and Hanvey, it provides a basis upon which the defence will attack her credibility which, without doubt, will be critically damaged. The prosecution depends upon the evidence of Andrea McKee, not only to prove that the present defendants committed the offences alleged, but also to prove that the offences were committed at all. In view of the threadbare state of her credibility there is no longer a reasonable prospect of convicting any of the defendants of the offences with which they are charged."* ([33919]).

26. Mr McGinty, when briefing the Attorney-General, put the matter this way: *"The key issue is whether, just because McKee has lied about why she didn't turn up on 22nd December, she may still be telling the truth about the main issue at trial. I accept that one untruth does not necessarily mean that a jury, properly directed, may not believe her evidence – particularly since she has already pleaded guilty to her part in the conspiracy."* ([40221]) See also the evidence of Mr McGinty where he confirmed that the focal test which was being applied, as he understood it, by the Director and the Attorney-General was *"whether the doubts that had arisen about Andrea McKee's credibility based on the lies she had told about Pendine were such as to result in a situation where there was no longer a reasonable prospect of conviction..."* (18.9.09, Day 66, p25).

27. There can be no doubt that those involved in the decision making process applied the correct test: did the lie on the peripheral issue so damage Andrea McKee's credibility on the principal issue such that there was no reasonable prospect of conviction?

The application of the test

28. The ODPP gave thorough and careful consideration to the question of whether there remained a reasonable prospect of conviction. In doing so it took into account all relevant factors, principally:

a. The essence of the case against Andrea McKee was that she had given a false statement on 29 October 1997 in order to assist R/Con Atkinson and had done so in the presence of a senior police officer (DI Irwin) and a solicitor;

b. She had confessed to her part in the crime when she had nothing to gain from doing so, and would most likely face a custodial sentence. She did so at a time when the Police had no way of otherwise proving her involvement;

c. She and her husband had pleaded guilty to the offence and she had received a 6 month suspended prison sentence;

d. She was an accomplice witness in relation to whom it was overwhelmingly likely that a warning would be given as to the dangers of convicting without supporting evidence;

e. Whilst there was some corroboration of her account on the principal issue (as identified in the advice of Gerald Simpson QC at [20049], including her and her husband's pleas of guilty), it was limited, and it was accepted that without her evidence there would be no basis on which a prosecution could proceed;

f. Her evidence and her credibility would be the central issues at trial;

g. The lie concerned a peripheral issue, unconnected to her evidence against Atkinson and others;

h. Nonetheless, it was a significant lie which she would persist in if called to give evidence;

i. The Prosecution would be obliged to disclose to the Defence the outcome of their investigations into the Pendine issue;

j. The Defence would be entitled to cross-examine her on the issue at trial.

29. At the same time as inquiries were being made into the Pendine issue, the Police were also investigating the threatening letter which Andrea McKee had received on or around 23 December 2003. Those investigations yielded no firm answers as to the provenance of the letter and it was accordingly disregarded by the ODPP in reaching its decision on her credibility. As Gerald Simpson QC explained in his advice of 16 March 2004:

> *"There remains the issue about the letter which she received. The provenance of this letter is, at of this date, unknown. There is suspicion that the letter was not sent by persons ill disposed to her, but that she was aware it was coming and might have been expecting it to arrive during the relevant weekend, thus giving her a reason for not coming.*

> *In the event the letter did not arrive until the Monday. However, the matter remains unresolved and I have not taken into account, one way or the other, in coming to my decision."* ([39915])

30. The final decision was taken by the Director himself, with the superintendence of the Attorney-General. Whilst the Closing Submissions are correct in their recognition (at Part 18, §28) that the Attorney's power of intervention was rarely used, it is also right to note that if he had had concerns with the decision then he would have expressed them in strong terms to the Director (see Mr McGinty's note to the Attorney-General, 18 March 2004, [40222] and his evidence to the Inquiry, 18.9.09, Day 66, p34). Equally, whilst it was suggested to Mr McGinty in cross-examination that there were some matters of detail about the medical evidence of which he and the Attorney had not been informed, he also confirmed that those factors would have had no bearing on the outcome, not least because at that juncture the concern was not with the precise extent of the child's illness but with Andrea McKee's credibility (18.9.09, Day 66, p35).

31. In the event, it was the view of all concerned in the decision-making process that Andrea McKee's credibility was so damaged by the lie she maintained in relation to Pendine that there was no reasonable prospect of conviction. In addition to the Director, that included the Attorney-General, Mr McGinty, Gerald Simpson QC, Christine Smith and Ivor Morrison, three of whom had consulted with the witness in person (and, in Mr Morrison's case, done so on two occasions). David Perry QC reviewed the issues and concluded that:

> *"In my opinion, the decision of Leading Counsel was one reasonably open to him as Counsel in the case, particularly as he had himself seen and heard the witness in consultation. Moreover, it was reasonable of the Director to reach the same conclusion. It follows that the decision not to continue with the prosecution was reasonable."* (First Advice of David Perry QC, [82136]-[82180], §9.37)

32. The Director accepted in evidence that this was a decision on which reasonable prosecutors may have differed: it was a finely balanced judgment (18.9.09, Day 66, p121). It remains the case that it was a reasonable decision reached with due diligence. Having considered the decision in detail, and advised upon it in writing, David Perry QC was asked by the Secretary of State to elaborate on his advice in conference. The record of that meeting indicates that he was asked whether there was *"room for doubt"* about the decision to discontinue the prosecution. It goes on: *"Perry didn't think so. Senior Counsel, having seen the witness, had formed the professional judgment that she was unreliable."* The fact that others may disagree with this assessment is, with respect, irrelevant. As the Director rightly pointed out, this is plainly a decision about which reasonable prosecutors might differ.

<u>The relevance of the committal stage</u>

33. It has been suggested in the evidence that the ODPP should have at least allowed the case to proceed to the committal stage. The PPS strongly disagrees that it could ever be an appropriate course of action to allow a case to proceed to committal where it is not considered to have a reasonable prospect of conviction at trial. At the committal stage, the Court is bound to take the evidence at its height, disregarding issues of credibility. The ODPP is bound to reach prosecutorial decisions on the basis of the likelihood of conviction after a trial: if there is no reasonable prospect of such an outcome, the test for prosecution is not met. It would be unlawful for the ODPP to allow a prosecution to continue in such circumstances.

The conditional adjournment point

34. A number of questions were asked of ODPP witnesses about the description of the adjournment granted on 22 December 2003 as "conditional". It is accepted that there was no proper basis on which the Resident Magistrate could have retrospectively revoked the adjournment and thus ended the proceedings. It appears from notes recorded at the time that Mr Morrison and Mr McGinty may have misunderstood the position on this issue ([33909], §35; [40221]). However, it is also correct to note that the express and clear basis on which the prosecution was discontinued was because it was believed that there was no reasonable prospect of conviction, not because of any assessment about what the Resident Magistrate may or may not do at the committal stage. As the Director confirmed in his evidence, this issue formed no part of his reasoning and he himself doubted whether the Magistrate would have the power to bring the proceedings to an end on that basis (18.9.09, Day 66, pp65, 89, 90-91).

35. Moreover, and as Mr McGinty observed in his evidence: *"Even if we had actually failed at that committal stage, even if I had been right and the committal had failed at that stage, it was always open to the prosecution again, if they saw fit to charge her again, and to seek to commit later, or, indeed, the Attorney could have issued a voluntary bill. The question was whether, at the end of the day, it could proceed to trial with her as a witness."* (18.9.09, Day 66, p25). See also the Director's evidence on this same issue (18.9.09, Day 66, pp128-9).

36. It remains the case, nonetheless, that the Prosecution had been required by the Resident Magistrate to provide evidence in support of the adjournment. The Defence were very much alive to the issue and were pressing for the fullest possible disclosure ([33983]). For these reasons, inquiries had to be made and evidence had to be obtained. Any evidence obtained during that process was subject to the usual duty of disclosure: if it was capable of undermining the Prosecution's case, including by undermining Andrea McKee's credibility, it was relevant and disclosable. As the Resident Magistrate observed at the hearing on 27 February 2004 when informed of the state of the evidence, it appeared that the court had been misled ([33913], §§31-2).

The Chairman's question: what must be proved in order to establish the conspiracy to pervert the course of justice?

37. A question was raised during the evidence as to what it is required to prove in order to establish a conspiracy to pervert the course of justice. In particular, is it necessary to prove that the telephone call which Andrea McKee conspired to provide an innocent explanation for was in fact made for a criminal purpose, in order to establish that those who conspired with her were guilty of doing an act tending to pervert the course of justice?

38. The case law makes it clear that the answer to that question is 'no'. It is not necessary to prove that the purpose with which the phone call was made was in fact criminal. It is sufficient to prove that the parties conspired to conceal the true nature and purpose of the phone call during the course of a criminal investigation, and that they intended to do so. The Court of Appeal in *R v Selvage & Morgan* [1982] QB 372 explained that the offence includes:

> *"conduct which relates to judicial proceedings, civil or criminal, whether or not they have yet been instituted but which are within the contemplation of the wrong-doer whose conduct was designed to affect the outcome of them. That conduct includes giving false information to the police with the object of among other things putting the police on a false trail, obstructing the police in their inquiries into crime, the destruction of or other interferences with evidence and bringing wrongful influence to bear upon witnesses or potential witnesses."* (at 379)

39. In *R v Kiffin* [1994] Crim LR 449 the Court of Appeal considered a similar question to that which arises in the present case. It was held that (from the summary):

> *"an inquiry conducted by the police in order to establish whether an offence had been committed and, if so, who was responsible, was part of the administration of justice, even though it resulted in showing that no offence was committed. The concealment or destruction of evidence relevant to the investigation was clearly an act which had a tendency to pervert the investigation in turning it from its right course. It was not accepted that an investigation could not be regarded as being carried out in the course of public justice unless there already existed evidence that a crime had been committed; otherwise a person who destroyed the only evidence of a crime before the investigation began could not commit the offence. Whether an act had the requisite tendency would depend on the circumstances in which it was done and the particular aspect of the course of justice at which it was aimed."*

Finality of answers to questions going only to credit

40. An issue arose during the evidence as to whether the underlying documentation which showed Andrea McKee to be lying on the Pendine issue could be put to her in cross-examination by the defence. There is a long-

standing rule that evidence is not admissible to contradict answers given on cross-examination as to credit: see Archbold 2009, §8-146. However, the PPS makes two observations:

a. The damage to Andrea McKee's credibility could have been done whether or not the documents had been put to her or evidence called in rebuttal of her answers. A simple series of questions would have elicited the fact that she had lied about Pendine. It could have been put to her, for example, that: she had told Christine Smith that she had been in the consulting room with the grey-haired doctor; that she had told Mr Simpson quite the reverse; that her explanation was implausible; that the phone records did not show any contact (3.9.02, Day 59, p59). The essence of the rule that answers to collateral questions are final presupposes that such questions can be asked in the first place.

b. In the present case, Andrea McKee was the principal prosecution witness against Atkinson and others, both as to the existence of the alleged conspiracy at all and the involvement of the defendants in it. It could be said that the only issue at trial was whether or not she was telling the truth. The defence case would have been that she had lied to the Police in 2000 during the course of a criminal investigation, by telling them that there had been a conspiracy and that the defendants had been involved in it. The material in relation to Pendine would show her to have again and very recently lied to the Police during a criminal investigation. It was not a matter which would have unduly lengthened the trial: the questions and documents would have been short and self-contained. In those circumstances, it is likely that the trial judge would have permitted the documents to be put to her in the event that she did not admit the facts therein.

<u>The remaining issues raised in §28 of Inquiry Counsel's Closing Submissions</u>

41. Inquiry Counsel suggests in §28 that in determining the "degree of diligence" which this decision required, the Panel should take account of (a) the importance of the charges and (b) the absence of effective oversight by the Attorney-General.

42. The PPS submits that the gravity of a criminal charge is immaterial to the degree of diligence required in determining whether there is a reasonable prospect of conviction. In terms of the test for prosecutors, an assessment of a witness's credibility is material to the first limb of the test (viz. whether the evidence is sufficient to afford a reasonable prospect of conviction). Whilst the gravity of a criminal charge may be relevant to the second limb of the test for prosecutors (viz. whether a prosecution is in the public interest), it has no bearing whatsoever on the first limb.

43. As to the second suggested factor, the PPS strongly takes issue with the formulation in §28. First, Inquiry Counsel wrongly equates effective oversight by the Attorney-General the exercise by the Attorney of his power of

direction. Secondly, and more importantly, the question of whether there was oversight of this decision is immaterial to the degree of diligence required. The decision was taken personally by the Director (the head of the prosecution service). The Attorney-General has a general duty of superintendence over the Director, but this does not imply that the Attorney need be consulted over every prosecutorial decision. It could never be said that a decision was made without due diligence, merely because it had not been brought to the Attorney's attention. However, in the present case, the decision was in fact brought to the Attorney-General's attention. He was fully familiar with the material facts and, as Mr McGinty explained, he had paid a close interest in the progress of the case. The decision to discontinue was specifically brought to his attention and the arguments for and against discontinuation outlined in a briefing document. Mr McGinty advised the Attorney that the decision to discontinue was sound, but reminded him that if he (the Attorney) strongly disagreed then the best way to mark his disapproval would be to voice a strongly worded objection rather than to exercise his power of direction. The Attorney, having considered the material, did neither. As Mr McGinty explained the Attorney would have objected if he thought the decision was unreasonable. It was plain from his consultations with the Attorney that the Attorney did not take this view, but was anxious to ensure that the decision was properly explained in Court.

43. Against this background, it is entirely illogical to suggest that the mere fact that the Attorney has rarely exercised the power of direction in those specific cases which have been brought to his attention is somehow relevant to the degree of diligence which was called for on the part of the decision-maker within the ODPP, or that it is any kind of indicator that the decision-making process lacked due diligence.

29 There is no doubt that considerable attention was paid to the question whether Andrea McKee could be used as a witness. However, the issue is whether that attention missed the point. She and her husband had pleaded guilty to substantially the offence with which Res Con Atkinson was charged. As at 18 March 2004 the Case officer, Mr Morrison, believed that a jury would probably find that the pleas of guilty were properly entered. That satisfied the test for prosecution, and Mr Morrison declined to tell the Inquiry why, in those circumstances, the matter was not left to a jury. The Panel may wish to consider whether that was because he was unable to provide an answer.

Submissions by Arthur J Downey Solicitors (Andrea McKee)

We agree

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We agree with this analysis.

Submissions by the Public Prosecution Service

1. It has been suggested in evidence and in the Closing Submissions that, if Mr Morrison took the view that a jury would probably conclude Andrea McKee and her husband had entered their guilty pleas on a proper basis, then the test for prosecution was met (17.9.09, Day 65, p132).

2. The PPS does not accept this proposition. Andrea and Michael McKees' pleas of guilty were undoubtedly important factors to be weighed in the balance in determining whether the lies Mrs McKee had told about Pendine so undermined her general credibility that there was no longer a reasonable prospect that a jury would be prepared to convict upon her evidence. There is nothing to suggest that this factor was ignored. It is, moreover, wrong to say that it inevitably led to the conclusion that the test for prosecution was met. Andrea McKee's recognition of her own guilt, through her plea of guilty, did not inevitably mean that the test for prosecution was met against any person she named as being involved in the conspiracy with her.

3. It is important to recall that Mr Morrison was not the decision-maker. The decision was made by the Director himself, having canvassed the views and advice of all those who had consulted with Andrea McKee. Inquiry Counsel is unable to point to any error in the Director's process of reasoning on this point and the PPS accordingly submits that this criticism is unfounded. The Panel is reminded that the Director specifically took into account Andrea McKee's plea of guilty as a relevant factor in reaching the decision that she was no longer a credible witness ([33886]).

4. In any event, for the reasons already outlined above, and elaborated in response to §32, below, the reasonableness of substantive decision does not fall within the Inquiry's Terms of Reference.

30 Although the Director recognised that a lie about Pendine was peripheral and therefore may not affect Mrs McKee's credibility on the core issue, it is clear that neither Mr Simpson QC nor Miss Smith BL directed themselves to that issue. Rather, it is plain from their contemporaneous documents and from their evidence to the Inquiry that they were focusing on the question whether Mrs McKee was lying to them. Although Mr Simpson's Advice referred to matters other than Pendine, they appear to have been included only for background. The Panel may wish to consider whether, for example, there is any evidence that any person within or instructed by the ODPP had regard to the number of occasions on which Mrs McKee had consistently told police about the conspiracy.

Submissions by Arthur J Downey Solicitors (Andrea McKee)

We agree

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

Please see our comments at 24.6 above.

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

At all times Mr Simpson QC and Ms Smith BL appropriately directed themselves to the core issue.

Submissions by the Public Prosecution Service

1. Inquiry Counsel rightly accepts that the Director applied the correct legal test in determining whether Andrea McKee's lies about Pendine affected her credibility on the core issue. This concession is rightly made for the reasons outlined in response to §27, above. In particular, it is entirely plain from the Director's comments during the meeting of 26 February 2004 that he was fully alive to this central question. It is equally clear from the Director's letter to the Attorney of 18 March 2004 ([33908]) and the statement he authorised to be read out in Court ([33887]).

2. Despite this, Inquiry Counsel suggests at §30 that Mr Simpson QC and Ms Smith failed to direct themselves to that question and focussed instead on the question whether Mrs McKee was lying to them. Even if this submission were factually correct, it would be immaterial to the diligence with which the decision was reached. This is because the decision-maker himself applied the correct test. The mere fact that someone advising him may have applied the wrong test has no bearing on the issue.

3. More importantly, the suggestion is factually inaccurate. It is quite clear from a fair reading of Mr Simpson's advice of 16 March 2004 ([39915]) that he too was applying the correct test. The advice sets out all relevant considerations and concludes that the overall effect of the lies which Andrea McKee had told (and would repeat if called to testify) was *"to contaminate any evidence she may give and completely to undermine her general credibility"*. It is, with respect, difficult to see how Inquiry Counsel can assert that Mr Simpson focussed on the wrong issue. The suggestion that his recitation of the relevant factors was *"only for background"* is unjustified. These matters were plainly included in the advice because they were relevant to his overall conclusion.

4. Inquiry Counsel also suggests that the Panel should consider whether those within or instructed by the ODPP had regard to the number of occasions on which Mrs McKee had consistently told police about the conspiracy. In the PPS's submission this would have been an irrelevant factor for it to take into account. The ODPP was not concerned with whether it, or any member of its staff, individually believed Andrea McKee on the central issue. It was concerned with whether a trial court would believe her on the evidence which could be presented to it. It is a long established rule that previous consistent statements of a witness are not admissible in evidence: *Jones v SE and Chatham Ry* (1918) 87 LJKB 775 at 779; see further, Archbold Criminal Pleading, Evidence and Practice 2009 [8-102], and the position as now codified by the Criminal Justice (Evidence) (Northern Ireland) Order 2004, Article 24, in force from 18 April 2005. Whilst the ODPP was aware that

Andrea McKee had given a consistent account of her involvement in the conspiracy from 2000 onwards (not least because she did so in consultation with Miss Smith and Mr Morrison on 21 October 2003), it was not a matter which could be advanced in evidence as bolstering her credibility.

31 Mrs McKee's child was ill over the weekend prior to 22 December 2003, and on 9 January 2004 she gave a detailed account of that illness in the period leading to 22 December 2003. The Panel may think that a good test of whether the office of the ODPP was engaged in determining whether Mrs McKee was generally credible, is whether it took steps to direct that a medical report be obtained from her GP to test what she said about her child's illness. The account given on 9 January 2004 was not checked.

Submissions by Arthur J Downey Solicitors (Andrea McKee)

We agree

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We submit that the DPP failed to direct a vigorous investigation into the medical condition of Andrea McKee's son. The Director himself was unaware that the GP notes at Wrexham were so poor that one of the two visits prior to the 22 December was not recorded (paragraph 24 page 57 document 33991). During the consultation of the 9 January Andrea McKee stated her belief that her son's condition came from the MMR vaccination he had received some months previously and she claimed that her doctor was concerned about the swelling of her son's testicles. We would suggest that it would be reasonable to have expected the DPP to direct that a medical report be obtained from the GP, providing greater detail of the child's medical history and medical advice given. Given that Ivor Morrison stated that he did not believe her account (paragraph 24.47) we are concerned that he never considered checking this with her GP.

Submissions by the Public Prosecution Service

1. Inquiry Counsel suggests that the ODPP was at fault in failing to obtain a more detailed medical report from the GP in order to verify or contradict the account which Andrea McKee gave to Christine Smith and Ivor Morrison on 9 January 2004 about the progress of the child's illness. This issue is addressed in the submissions set out under §27, above. In short, the PPS submits that the GP reports which had been obtained reflected all contact between Mrs McKee and her GP. In so far as her account on 9 January included a narrative description of the child's illness derived from her own observations, this is not something which the GP could reasonably be expected to corroborate. The reports and statements obtained from the GP adequately reflected the child's condition when examined.

2. Inquiry Counsel goes on to suggest that the "failure" to obtain a more detailed medical report from the GP is evidence that the ODPP was addressing the wrong question, and was not focused on whether Mrs McKee was generally credible. This is, once again, a complete non sequitur. First, Inquiry Counsel concedes that the decision-maker (the Director) did indeed address his mind to the correct legal test, namely her general credibility. Secondly, the immediate concern about her credibility was the lie she had told about Pendine. The issue to be determined was whether that lie, taken in conjunction with the other relevant considerations, so undermined her general credibility that there was no longer any reasonable prospect of conviction. Even if the GP had been able to substantiate Mrs McKee's account (and there is no reason to believe that this would have been possible) it would not have altered the legal test which was applied in determining whether the prosecution should proceed.

32 If the decision about Mrs McKee's utility as a witness was not reached with what was, in all the circumstances, due diligence, the question arises whether that so influenced the murder investigation as to shape it. As at 18 March 2004, the murder file remained open. As noted above, it was possible that Res Con Atkinson had evidence to give against Mr Hanvey. Had he been successfully prosecuted, he may have given that evidence. In any event, the charges against Mr Atkinson and others arose from an alleged cover-up of a tip-off, so were intimately connected with the murder investigation.

Submissions by British Irish Rights Watch and Committee on the Administration of Justice

We agree. Please see our comments at 27 above.

Submissions by Edwards & Co Solicitors (Serving and Retired Police Officers)

This is speculation.

Submissions by Gus Campbell Solicitors (Marc Hobson)

The RUC did not inform the PPS sufficiently in relation to the tip of file and indeed misled them which had the effect of dictating the mind set of R.Davison in the assessment of Con Atkinson as a credibile witness in the Hobson trial and acceptance of the lack of sufficiency of available evidence in relation to the tip off file that could alter that assessment.

The PPS did not seek to direct the RUC to pursue reasonable lines of inquiry in relation to the tip off file so as to come to a conclusion in relation to the assessment of a potentially corrupt police officer as an accessory to murder being a witness in the murder trial of a suspect that he was alleged to be an accessory in.

Mr Burnside accepted that he was wrong to withhold information concerning this issue from the defence. It was accepted by Mr Davison and Mr. Burnside that they were bound by a proactive duty of disclosure to the defence at the trial of Hobson to disclose information that would cause the credibility of a

witness to be undermined, namely Con Atkinson and that were such evidence arose with a civilian witness the PPS would have that witnesses credibility and evidence reassessed as with Colin Prunty but not with a police officer. The view of these PPS officers was that if they believed that the defence were aware of a general allegation concerning issues as to the credibility of a witness and that therefore the defence could do their job in cross examination then they would not disclose any further information or indeed alert to defence to its existence. These issues would not be of sufficient importance so as to necessitate a file note concerning the reassessment of a witness , that being a police officer though for a civilian as with Colin Prunty that was precisely done in a consultation

Submissions by John P Hagan Solicitors (Robert and Eleanor Atkinson)

The decision about Mrs McKee's utility as a witness was reached with due diligence. Reserve Constable Atkinson had no evidence to give against Mr Hanvey other than that already known of the night of 26th/27th April 1997, other than that identified to Sergeant P89 at the scene.

Submissions by P J McGrory Solicitors (Family of Robert Hamill)

The DPP

Failure to consider use of Art 3 re Tracey Clarke

1. Tracey Clarke was a key prosecution witness in the case against the six charged with the murder of Robert Hamill. As was the practice of the Prosecution at that time senior prosecuting Counsel consulted with the witness at an early stage. In the case of Tracey Clarke this was done on the 17th October 1997 with Gordon Kerr QC. In attendance was Roger Davidson of the DPP, DSupt Cooke, D/Sgt Bradley and D/Con McAteer. During the consultation Mr Kerr took Tracey Clarke through her evidence and having done so was satisfied that she was a credible witness. He was prepared to put her forward as a witness of truth and was convinced she was giving as detailed a recollection as she could (1). Roger Davison of the DPP, although his recollection was not good, said in evidence that had he felt she was not giving truthful evidence he would had made a note to that effect but had not done so (2). Indeed in his note of the consultation he took the view that Tracey Clarke appeared to be telling the truth and that if she gave evidence would come across as very truthful(3) .

2. Roger Davison noted that the witness looked worried and as soon as Gordon Kerr began speaking to her she began to cry. At the end of the consultation she was asked about giving evidence but said that she could not because she loved Allister Hanvey and knew the others. Davison also noted, in the context of her giving the reasons for not wishing to give evidence, that she and her family were all very worried about the possibility of loyalist attack(4) . In oral evidence he said that although his note might read like that, he had got the idea she was afraid from her family (5).

3. Gordon Kerr, in his note of the consultation, records the reason from her for not giving evidence, to be that she loved Allister Hanvey and the others were friends of hers. He records that it was only her parents who had said anything which would have laid a ground for an application under Art 3.of the Criminal Justice (Evidence etc.) (NI) Order 1988. Her own declared reason did not provide such a basis. He also records that he asked Roger Davison to take instructions from Police about this matter and was simply advised that she would not be a witness and should be ignored for the purposes of his opinion(6) . Roger Davison makes no such note in his record of the consultation.

4. D/Supt Cooke was in attendance on behalf of the chief Constable who would be represented at consultations with witnesses where issues may arise between police and the DPP in regard to how a case would be approached (7). In his statement Mr Cooke said that he, like Kerr and Davison, believed she was telling the truth about what she saw. He also recalled she had said she was too frightened to give evidence and had a real fear about retribution by loyalist paramilitaries (8). In oral evidence he said his impression was that while she may have also given other reasons for not wanting to give evidence, she had a fear about what might happen if she did give evidence.

5. D/Sgt Bradley in oral evidence recalled that he also thought she was telling the truth and would have made a good witness (9). D/Con McAteer did not give any account of the consultation but, having been involved in recording the statement from Tracey Clarke said in evidence that, at the time, given the details she was able to relate he had no doubt that she was telling the truth(10) .

6. At no stage during the prosecution of the six defendants did Tracey Clarke tell the DPP or police that what she had said in her statement was untrue. Indeed all police and legal personnel who were in a position to evaluate her evidence were firmly of the view that she was telling the truth about what she had seen on the night.

7. Whilst Gordon Kerr asserts that he asked Roger Davison to take instructions from the police regarding a possible Art 3. application, the available documentary evidence seems to suggest that in fact what was given consideration was compelling her to give evidence.

8. Raymond Kitson took over conduct of the file on the 24th October 1997. He had telephoned Gordon Kerr QC the previous day who communicated his belief that Tracey Clarke could give credible evidence. He agreed with Roger Davison's view that without Tracey Clarke and Timothy Jameson there was no case against Forbes, Hanvey or Robinson. Mr Kitson discussed the compellability of Tracey Clarke with Mr Kerr QC who agreed it was a possibility but was a matter for the DPP. According to the note Mr Kerr QC told Mr Kitson that he had mentioned compellability to Mr Davison (11).

9. Mr Kitson then contacted D/I Irwin to obtain the police view on compellability. Mr Irwin's view was that if compelled there was no

reasonable prospect of Tracey Clarke giving evidence. He did not consider that, no matter what happened, Tracey Clarke would give evidence against any of the accused (12). Mr Kitson, notwithstanding this, asked him to speak to his superiors and reflect on the position overnight.

10. On the 28th October Mr Kerr again spoke to Mr Irwin who communicated the view of P39 that no matter what sanction was applied to Tracey Clarke she would not give evidence. Mr Kitson also notes that he spoke to D/Supt Cooke whose view also was that she would not give evidence (13).

11. Mr Kitson, on the basis of this, and that there was no other evidence likely to be forthcoming, records a decision to withdraw the charges against Forbes, Hanvey and Robinson (14). There is no record of an application by way of Art 3. having been considered at all.

12. In oral evidence Mr Kitson agreed that evidence of the fear of a witness could be inferred rather than expressed openly by them. He also agreed that were there were mixed motives for not wishing to give evidence, one of which was fear, then consideration should be given to putting the matter before the Court (15). This would depend on how persuasive the evidence was of fear and it would need to be weighed against the evidence of the emotional attachment to Hanvey and his friends.

13. Mr Kitson's recollection, in oral evidence, was that Tracey Clarke's evinced reason for not giving evidence was that she was in love with Allister Hanvey. His recollection was that the parents were concerned or worried about loyalist paramilitaries but not terrified. His view was that during the consultation she was not expressing any fear at all (16). This is inconsistent, the family submit, with both Roger Davison's note and the recollection of D/Supt Cooke. The evidence shows that fear of retribution by loyalist paramilitaries was expressed and the only contemporaneous record of consideration being given to this issue is that of Gordon Kerr QC (17). The DPP records do not disclose that this matter was considered by them or the view of police sought in respect of the matter. The focus of the office of the DPP seems to have been the issue of compellability and, when this avenue appeared closed, no other avenue was explored and the prosecution was dropped.

14. It is the family's submission that serious consideration should have been given to putting the matter before the Court. It appears, from the documentary evidence that the views of police who were at the consultation were not sought on the issue of fear. Similarly this issue was not canvassed with P39 who had dealt with Tracey Clarke when she made the statement and noted that she and Andrea McKee were frightened about that (18). Further there is no evidence of any direction to police to seek the family's view on the issue of fear and to attempt to obtain statements from them about what they had expressed at the consultation.

15. The evidence of the police present at the consultation as to the witness's demeanour would have been admissible to support an application under Art. 3: In re Neill [1991] 7 NIJB 83. It may also have been argued that evidence of the demeanour of her family could similarly have been given. The evidence of P39 as to the witness's demeanour would, it is submitted, also have been admissible to support the application as evidence of a continuing state of fear. Furthermore, no expression of reluctance on her part attributed to her relationship with Hanvey or her friendship with the others was evinced at the time of her making of the statement. Rather, the preponderance of the evidence is that she expressed fear and apprehension at that time. This, it is submitted, is evidence that could be considered when deciding the weight to be attributed to the reason expressed by Tracey Clarke that she did not wish to give evidence because of her love for Hanvey and friendship with the others.

17. In Mr Kitson's note (19), the reason for dropping the prosecution is that, without the evidence of Tracey Clarke and Timothy Jameson, there was no other evidence in the case. Whilst there was no other evidence which independently connected the accused to the offence police were already aware that telephone calls had been made between the Atkinson and Hanvey household which supported the account of Tracey Clarke regarding what Hanvey had told her about the advice he had received from Atkinson(20) . This evidence, it is submitted, would also have been admissible on an application under Art. 3, as it would have helped inform the court as to the reliability of the statement that it was sought to adduce under that provision.

16. A further issue to consider is whether the DPP acted with due diligence in withdrawing the prosecution when they did. The prosecution test, at that time, was whether there was reasonable prospect of a conviction (21). The question in this instance is not whether the DPP reasonably took that view having lost the evidence of Clarke and Jameson, but rather whether they acted with due diligence in failing to explore the possibility of her evidence being admissible under Art. 3. The appropriate time to consider the question of a reasonable prospect of a conviction was after having investigated the issue of fear and, if the evidence was available, making the application to the Court to have the statement admitted. It should be remembered also that, at this time, the matter was at the committal stage, the application would have been made to the Magistrate whose sole concern would have been whether sufficient evidence existed to establish a prima-facie case to return the accused for trial (22).

Decision to drop proceedings against Stacey Bridgett

17. On the 28th October 1997 Mr Kitson recorded a file note to the effect that the forensic evidence regarding Stacey Bridgett's blood was with him (23) but that he did not consider it sufficient to support the proceedings against him but that he was conscious that counsel was advising on this matter (24).

18. As noted above Mr Gordon Kerr QC was instructed in the case (25). His opinion was received by the DPP on the 13th November 1997(26). In it

he deals with the case against Stacey Bridgett (27). He notes that Jonathon Wright saw Bridgett fighting, Con Neill saw him face to face with another male and later with blood around his mouth. He noted that Con Silcock had been told by a female that one of the youths that had jumped on the head of one of the injured men had been called out to as Stacey by someone in the crowd and he had responded and he was bleeding from the nose. He opined that this evidence was inadmissible, presumably as it offended the rule against hearsay. He further noted that Con Cooke had seen Bridgett at the front of the crowd trying to get at the injured and he was also observed by Con A as being in the crowd again bleeding from his nose.

19. He referred to Bridgett's denials that he was in the crowd and the forensic evidence by way of his blood on Robert Hamill's trouser leg. This confirmed he had lied at interview. He went on to say that he would like further information on the nature of the bloodstain saying that his view was that the available evidence it could be shown that Bridgett was very much involved but the nature of his involvement was not clear (28).

20. As a result of this Roger Davison discussed the blood staining with Lawrence Marshall who, while reluctant to express a view as to how it had got there, said it was consistent with Robert Hamill lying on the ground and a drop of Bridgett's blood dripping on him as he stood over him (29).

21 On the 18th November 1997 a meeting was held between Roger Davison, Raymond Kitson and Gordon Kerr QC. During that meeting, according to Mr Kitson's note, Mr Kerr QC was of the opinion the fact that Bridgett had lied to police, as established by the forensic evidence, was insufficient to inculpate him. He said that in the circumstances where he was being interviewed about a murder and had denied being near the deceased would not be regarded as very compelling by a Court (30). On the issue of affray his opinion was that the problem was that it could not be shown exactly what he had been doing or had done around the time of the incident.

23. The charges against Bridgett were withdrawn in November 1997. In a memorandum to the Director of Public Prosecutions, Sir Alasdair Fraser, in the context of an enquiry from the Secretary of State, Mr Kitson stated that consideration had been given to charging the suspects, including Bridgett, with public order offences. However, given the time spent on remand in custody, some six months, and bearing in mind the maximum sentence in the Magistrate's Court for such offences was six months, it was not considered necessary to prosecute for such offences (31). In this memo Mr Kitson did not discuss the possibility of a charge of Affray.

24. The case against Bridgett and the others was subsequently reviewed within the DPP by Mr xxxxxxx after representations on behalf of the family. He came to the view that the opinion of senior counsel that there was no reasonable prospect of a conviction relating to the death of Mr Hamill was correct but that the decision not to prosecute for Affray was fine one (32).

25. It is the family's submission that the DPP should, at the very least, asked FASNI to further consider the import of the blood staining on Robert Hamill's jeans by way of blood spatter analysis. Lawrence Marshall confirmed in oral evidence that at the time he was not an expert in blood pattern analysis (33). He said that the analysis of the blood staining was selective and he had not been informed at the time that any of the assailants themselves had been injured and bleeding (34).

26. Secondly, in conjunction with this, the possibility of the evidence of Con Silcock regarding the unidentified woman being adduced should, the family submit, have been given more careful consideration by the prosecution. Mr Kerr QC dismisses this evidence without analysing whether it might fall into any of the exceptions to the rule against hearsay, in particular as part of the res gestae of the offence. The question to be considered is whether the possibility of concoction or distortion can be disregarded. If the circumstances in which a statement was made were as unusual, startling or dramatic as to make it an instinctive reaction, then a Court could conclude that the possibility of distortion or concoction could be excluded, provided the statement was made in conditions of proximate but not exact contemporaneity (35).

27. The res gestae point was raised with Mr Kerr QC in oral evidence. He firstly said that to qualify as res gestae it was not a case of whether the statement was concocted but rather that it had to be made instantly, as the offence was happening. He asserted that the statement of the woman was made after the assault on Robert Hamill and rather at a time when members of the crowd were being held back. When challenged as to whether it had to be instantaneous he said that the statement had to be made when the offence was continuing; there was continuing involvement in the offence. He did concede that the possibility of concoction was something that had to be excluded but that because a person was in a situation which excluded that possibility did not necessarily mean that the statement qualified under the res gestae rule. He said that in this case the person was not reporting something that formed part of the assault which caused the death, albeit that it was part of the continuing disorder (36).

28. With the greatest of respect to Mr Kerr QC, the family submit that this misstates the law on res gestae and the facts of this case. What in fact Con Silcock said in his statement was:

"On several occasions I pushed youths away from the injured men as they appeared to try and kick the men. One of the rowdy youths was pointed out to me by a woman wearing a white top, who alleged that this youth had jumped on the head of one of the injured men. This youth was wearing a grey charcoal top. He also had blood coming from his nose. A member of this crowd called to this person, calling him Stacey. He responded to this name." (37)

What is clear from this is that the woman was reporting something which had occurred as part of the assault which caused the death of Robert Hamill, viz, that the youth she pointed out had in fact jumped on Robert Hamill's head.

The remainder of the passage is Con Silcock's own direct observation that this person was bleeding from his nose and answered to the name Stacey.

29. The leading authority on res gestae, was then (and still is) R v Andrews (38). Their Lordships in that case pointed out that the primary question that a judge must ask when considering the issue of admissibility under this doctrine was whether the possibility of concoction or distortion can be disregarded. The issue is not one therefore primarily of the circumstances or contemporaneity with them but rather whether those factors point toward or away from the possibility of concoction or distortion. In short there are no hard and fast rules about when such a statement should be made.

30. In this case the family say that the statement was clearly made very shortly after the assault. Not only was disorder still continuing but the person pointed out was still part of the crowd and one of those identified by Silcock as attempting to get at the injured men. There is no evidence to suggest that the statement may have been concocted, indeed the fact that the woman did not identify Bridgett by name points away from the possibility that she concocted the allegation. The possibility of distortion is excluded by the fact that the statement was made in conjunction with a physical pointing out of the assailant and that it was made directly to a police officer who was in the presence of the alleged attacker. The scientific evidence further serves to exclude the possibility of distortion. Taking all these factors into consideration the family submit that there is a compelling argument for admitting that part of Con Silcock's statement in evidence.

31. That being so, the family further submit that there was, and remains, the reasonable prospect of a conviction of Stacy Bridgett for the murder of Robert Hamill.

32. If, however, that portion of the evidence of Con Silcock is inadmissible as hearsay, the family contend there remains sufficient evidence to prosecute him for the offence of affray. Mr White in his review of the evidence said that the decision not to prosecute was a fine one. That is another way of saying that, had the decision been to prosecute, he would not have disagreed with it. The main difficulty identified by Mr Kerr QC in his opinion seems to be that the evidence did not what exactly Mr Bridgett had been doing.

33. In this jurisdiction in 1997 affray was a common law offence defined as unlawful fighting used, or display of force, by one or more persons in a public place in such a manner that a reasonable person might reasonably be expected to be terrified (39). It typically involves a continuous course of conduct the criminal nature of which depends on the conduct as a whole and it is not necessary to identify and prove particular incidents (40). Therefore if a defendant is an active participant in a crowd which is engaged, for instance, in unlawful fighting he is guilty of affray.

34. Mr Kerr, as outlined above, noted in his opinion the various pieces of evidence, including an eyewitness account of his actually fighting, which mark Bridgett out as an active participant in the crowd which was engaged in violent

disorder. The fact that the pieces of evidence were disjointed, to use Mr White's words (41), is with respect, neither here or there, if anything it serves to demonstrate that his course of contact was continuing which underlines his active participation. This evidence the family contend, allied with the police descriptions of the alarming nature of the incident, was, and is, more than sufficient to provide the reasonable prospect of the conviction of Stacey Bridgett for affray.

The decision to withdraw proceedings against Wayne Lunt

35. The evidence involving Wayne Lunt in the assault on Robert Hamill is found in the statement of Colin Prunty (42) whom Mr Kerr QC described as one of the most impressive factual witnesses he had spoken to in some time(43) . In his statement he said he saw a policeman grab a male who was kicking Robert Hamill. He described him as wearing a Rangers scarf and that he was taken away and put in the Land Rover. After 5-10mins he saw this man being let out of the back of the Land Rover and going back into the crowd shouting "up the UV". He asked a policewoman why he had been let go. He described the scarf in some detail and in particular the way it was worn up tight to his neck.

36. Mr Kerr QC consulted with Colin Prunty on the 30th October 1997. Mr McCarey's note of the consultation records that Colin Prunty didn't see anyone, except the man put into the back of the Land Rover, wearing a Rangers scarf (44).

37. Con A who initially detained Wayne Lunt at the scene describes him as wearing a red, white and blue scarf and says she placed him in the Land Rover (45). No other suspect is described by her as being placed in the Land Rover during the disturbance. When arrested and interviewed Lunt confirmed he was wearing a Rangers scarf (46).

38. Colin Prunty then saw some news footage in which he purported to indentify Dean Forbes as the person he had seen on the night wearing a Rangers scarf (47). As a result of this Mr Kerr Q.C. again consulted with Colin Prunty. He asked for photographs of Lunt and Forbes to be shown to Prunty. He felt that this was a proper procedure as Prunty was not an identifying witness of Lunt. Prunty was then adamant that Forbes was the person wearing the scarf and not Lunt. On the basis of this it was Mr Kerr's opinion that there was no reasonable prospect of a conviction.

39. It is clear from the other evidence that Prunty is simply mistaken about this. Once he had identified Forbes as the man wearing the Rangers scarf from the television footage he was bound to recognise him in the photograph and this could only serve to compound his error. Not only is there no other evidence of anyone wearing a Rangers scarf that night, only one person is placed by Con A in the back of the Land Rover and this person is wearing a Rangers Scarf. Had Mr Prunty only observed Lunt in the crowd and not also in the Land Rover then his evidence would have been weakened by his

mistake. He did not, after being shown the photographs, resile from the assertion that the man in the crowd and in the Land Rover were one and the same. Since however, he witnessed him both in the crowd and in the back of the Land Rover, this coupled with Con A's evidence points strongly to the attacker with the scarf being Wayne Lunt.

40. The family respectfully endorse the view of McCollum LJ expressed in the trial of Marc Hobson that if Mr Prunty's observation that the man in the crowd and in the Land Rover were one and the same then this was strong prima facie evidence of his involvement in the murder(48) . It is the family's submission is that his observations notwithstanding coupled with the evidence of Con A provide a reasonable prospect.

The decision to drop the prosecution of Robert Atkinson

41. On the 20th June 2000 Andrea McKee made a statement saying that the statement she had made on the 29th October 1997, insofar as it related to the alibi on behalf of R/Con Atkinson (49) was false. As a result, after the prosecution of Andrea McKee and her husband Michael for their part in the conspiracy, R/Con Atkinson finally faced criminal proceedings in relation to the part he played in the events immediately after the ultimately fatal assault on Robert Hamill.

42. The facts of the conspiracy were as set out in the Crown summary at the sentencing hearing of Michael and Andrea McKee. In short Michael McKee had told police that he was responsible for the alleged telephone call from R/Con Atkinson's home to the suspect's, Allister Hanvey. Andrea McKee confirmed this telling police they had stayed at the Atkinson's and her husband was ringing Hanvey's to check on their niece Tracey Clarke who was then Hanvey's girlfriend.

42. The committal proceedings against R/Con Atkinson his wife and Kenneth Hanvey were brought before Craigavon Magistrate's Court in 2003 some 6 years after the death of Robert Hamill. The case was listed for hearing by way of mixed committal on the 27th October 2003. Andrea McKee had previously indicated that she was willing to give evidence but wished to travel over from Wrexham and back on the same day. She was escorted by Con Patricia Murphy (50).

43. At that hearing there were defence objections to the particular RM hearing the case and he discharged himself from the case. The case was therefore adjourned to the 2nd December 2003 to run for 4 days (51).

44. On the 19th December 2003 Con Murphy contacted Andrea McKee regarding the hearing on the 2nd December. Andrea McKee did not indicate any difficulty at that stage according to Con Murphy. On Sunday 21st Con Murphy spoke to Andrea McKee who told her that her son was sick. The constable, in her Inquiry statement based on her notebook from the time, that Andrea McKee told her that her son had mumps and ochtitis (sic). His

testicles were swollen and there was a concern that he might fit due to his high temperature (52). She explained that her son's illness had started about 2 weeks previously with an ear infection. He had been taken to see the Doctor twice and there had been one home visit by the Doctor. He had been prescribed amoxicillin and Calpol. Andrea told Con Murphy she was intending to take her son to the Doctor on Monday morning. She apologised but was not prepared, as a mother, to leave her child to travel to Court when he was ill.

45. On the morning of the hearing Con Murphy contacted the GP's surgery but the child's doctor was unavailable and the two other Doctors were unwilling to commit anything to writing for the Court (53). At the hearing the defence agreed to adjourn the case if Andrea McKee could not travel because of her child's illness. The prosecution were to provide documentary proof of the child's illness. Mr Morrison of the DPP described the adjournment as conditional upon this being produced at a later date (54). It appears that the Court was told that she could not attend because her two year old son had mumps and swollen testes (55). The case was fixed for mention in early January and if all was in order would proceed on the 8th March 2004. A medical certificate was to be provided to the defence by 2nd January 2004(56).

46. Later that day Con Murphy phoned Andrea McKee. She said Ms McKee informed her she had taken her child to the doctor who had diagnosed a respiratory infection. She indicated a willingness to travel to court for the new hearing date but said if it were to last more than a day would have to bring her son with her(57) .

47. On the 24th December 2003 a fax was received from Wrexham police bearing the statement of Dr xxx who said he had seen the child on the 19th December 2003 and diagnosed an ear infection and the possibility of mumps. His colleague had seen him on the 22nd and an ear infection in both ears was diagnosed (58). Mr Morrison makes the point that neither diagnosis referred to swollen testes, a high temperature, danger of fitting or ochtitis (sic). His assessment was that this was not consistent with the information given to the Court on the 22nd December 2003. He felt that the defence would attack this evidence as an inadequate basis for an adjournment (59).

48. A further statement was obtained by Wrexham CID confirming that the doctor had visited the child at home on the 11th December 2003 (60). According to D/I Whitehead, at some point Andrea McKee told police in Wrexham that she had visited an out of hours surgery in Pendine (61). The police checked but could find no record of this visit. D/I Whitehead noted that the records of the out of hour's surgery consisted of a notepad upon which the call details were recorded (62).

49. In the interim Andrea McKee received a threatening letter purporting to be from the LVF. D/I Whitehead who visited her at that time noted her to be very frightened (63).

50. On the 9th January 2004 Mr Morrison, Christine Smith and D'I H consulted with Andrea McKee. She again asserted that she had been to Pendine out of hours surgery (64). Further meetings were held within the DPP and Mr Gerry Simpson QC was instructed to advise on Andrea McKee's general credibility and he consulted with her for this purpose.

51. In his opinion Gerry Simpson he concluded that Andrea McKee had concocted the story about taking her child to the surgery; that there was no shred of corroboration for her story and the effect of her maintaining it was to contaminate any evidence she might give and completely undermine her general credibility(65) .

52. On 18th March 2004 Sir Alasdair Fraser QC, wrote to Mr Kevin McGinty informing the Attorney General that the ODPP was minded to offer no evidence in the prosecution of Res Con Atkinson and others in the light of the opinion of Gerald Simpson QC of 15 March 2004.

53. Mr McGinty discussed the matter with the Attorney General and reverted to Sir Alasdair on the evening of the 18th March(66) . He raised the issue of Andrea McKee's having already pleaded guilty to her part in the conspiracy. The Director records that he had considered this but was conscious that, as an accomplice, the jury would have to be warned about convicting without corroboration.

54. A prepared statement to be read to the Court was discussed and in particular an amendment which stated that Andrea McKee's explanation for her non-attendance on the 22nd of December 2003 was such as to undermine her credibility on the charges before the Court.

55. The two issues arising from this sequence of events are whether the explanation for non attendance would have been acceptable to the Magistrate's Court and whether, if untrue, would have affected Andrea McKee's credibility to the extent suggested by Mr Simpson QC.

56. It is suggested by Mr Morrison that the adjournment which was granted on the 22nd of December 2003 was "conditional" on the prosecution providing satisfactory medical evidence(67) . The family submit that the use of this term is somewhat disingenuous of Mr Morrison. It connotes that somehow the adjournment would not be granted unless medical evidence was produced. This is completely illogical as the adjournment was if fact granted and the case relisted. Once granted it could not be undone. What is a better description of what happened, the family submit, is that it was a condition of the adjournment, granted on the oral submissions of the prosecution, that the reasons proffered be evidenced in writing at some future point.

57. What the RM was told was, according to Mr Morrison's own note, was that the child had mumps and swollen testes. What the medical evidence disclosed was that the child had been treated for an infection in both ears and had suspected mumps. Had this medical evidence been given to the Court what would have been the outcome? Both Christine Smith and Mr Morrison

both conceded in oral evidence that the case would not have been stopped (68) . Indeed Mr Morrison went further and suggested that if no evidence was produced it was very unlikely that the case would be stopped. The RM may have felt that the position was slightly overstated on the 22nd December but may well have taken the view that the information was coming to the court third hand as the result of a telephone conversation and that inaccuracies were quite understandable in those circumstances. Any view taken by the Court would have to have been in the context of a worried mother with a sick male child who was suspected of having mumps having had the MMR vaccine.

58. Similarly the issue of Pendine Park could have been dealt with by simply telling the Court that the witness had mentioned the visit but the Crown were unable to confirm it. Again, the family submit, it is most unlikely that the RM would have stopped the case as a result of this

59. Although Mr Morrison and Christine Smith both recognised in their oral evidence that the RM would not stop the case this was not the impression given to Mr McGinty. He said in oral evidence that his view, which he put to the Attorney General, was that the RM would stop the case and that if he had known that there was a contrary view he would have communicated this to the A-G (69). Given that the role of the A-G is superintendence of prosecutorial decisions it is of concern that he considered this case having been presented with misleading information particularly since the Director himself confirmed in oral evidence hat this was not a relevant consideration for him (70).

60. The issue of Andrea McKee's credibility in light of her alleged lie in respect of the visit to Pendine is of greater concern to the family since it is this which formed the basis for the withdrawal of the prosecution. Whilst it is right to say that the issue of credibility was not one for the Court at the committal stage and the burden of proof is easily satisfied, the DPP's stated reason for withdrawing the charges was that there was no longer a reasonable prospect of a conviction. In this they relied heavily on the opinion of Mr Gerry Simpson QC.

61. Mr Simpson QC had the benefit of consulting with Andrea McKee and formed the view that she was lying about the visit to Pendine. In his opinion Mr Simpson QC says that in the circumstances of the case, the prosecution will be called upon to explain the adjournment because of her non-attendance on the 22nd of December 2003. He further says it would be inappropriate to put forward the version of events she had given believing, as he did, that it was untrue and that she would lie in the witness box (71). It is unclear what exactly Mr Simpson means by this. If he means that the prosecution would have to explain to the Magistrate's Court this could have been done as outlined at 52. above. There would have been no need to put Andrea McKee in the witness box for this purpose. The defence of course may wish her to be tendered for cross examination, however this is an extremely remote possibility, and in any event does not involve the prosecution putting forward anything more than what they knew. Even if an RM came to the view that the witness was lying about this particular fact there was still ample evidence that

her child had been ill. All that an RM could do in these circumstances, the family submit, was to proceed with the committal.

62. If Mr Simpson means that the adjournment would have to be explained at the trial it is difficult to see on what basis the Crown Court would call upon the prosecution to explain the circumstances of an adjournment in the Magistrate's Court. Whilst the defence would, quite rightly, have sought disclosure of the various enquiries made by police, providing these would have been the totality of the prosecution's duty in this regard. There is no necessity for the Crown to lead any evidence at the trial of the adjournment. It is simply not relevant to the prosecution case in the Crown Court. Cross examination by the defence of Andrea McKee as to her credit would have, of course, been entirely proper, but this is a matter for the defence. The family do not see how, in either the Magistrate's or Crown Court, it would have been inappropriate for the Crown to rely on the evidence of Andrea McKee.

63. Whether it could be said that such cross examination would undermine the witness's credibility to such a degree that there was no reasonable prospect of conviction is the matter, with respect, which should have been the real focus of Mr Simpson's opinion. He asserts that as an accomplice the issue of Andrea McKee's credibility was of central importance, there is no analysis of what the Court's approach might be in the circumstances. He instead concludes that because she is telling a lie, as he believes, regarding the Pendine visit, this completely destroys her credibility on the charges. This, the family submit, is too great a leap to make and is not supported by any authority on the subject.

64. To be fair to Mr Simpson it is apparent from the context that he was being asked to confirm the view already held by the DPP. He was present at meetings with Ivor Morrison and Christine Smith on the 17th & 25th February 2004 when strong concerns about Andrea McKee's credibility were aired(72) . There was then a meeting in the Directors office on the 26th February. Mr Simpson expressed the view then that while there was no reason to doubt her evidence on the main issue, her credibility would be damaged by the Pendine issue(73) . It was clear there was already a view being formed within the DPP of which Mr Simpson Q.C. can only have been acutely aware when he embarked on the consultation with Andrea McKee.

65. If the trial had proceeded and Andrea McKee been cross examined as to her credit and the jury came to the view that she had told a lie about Pendine, would they come to the view, as a result, that she was lying about the involvement of the accused in the charges before the Court? As the Courts here have recognised, a person may tell lies but still give credible evidence(74) . Of course the nature of the lie told and it's bearing on the issues before the Court will be matters for the jury to consider. The fact is that the lie here relates to a wholly peripheral issue and one which had no nexus with any of the evidence to be adduced in support of the Crown case. The jury would have been faced with a worried mother whose infant son was ill, after an adjournment had been granted on that basis, telling an untruth to embellish her story. In the circumstances of the case and with the evidence of her and her

husband's pleas of guilty, the family submit it is highly unlikely that a reasonable jury would come to the conclusion that there was a doubt about her evidence on the charges before the Court.

65. Mr McGinty in advising the A-G of the case asserted that, as an accomplice, Andrea McKee's evidence would have to be considered by the jury subject to a warning from the Judge. This, with respect, misstates the law at that time. Formerly the law was that a jury had to be warned about the danger of convicting on the uncorroborated evidence of an accomplice. That requirement was abolished in this jurisdiction by the Criminal Justice (NI) Order 1996. At the time of this prosecution the Judge had instead a wide discretion whether or not such a warning was required. The circumstances in which a warning was desirable were considered, in the context of the equivalent provision, in R v Makanjuola(75) by the Court of Appeal in England. There the Court said that for a warning to be appropriate there would need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. In the family's submission, in this case, even if it were shown that Andrea McKee had lied about Pendine, this was such a peripheral issue that it did not constitute an evidential basis for saying that her evidence on the issues before the jury was unreliable and therefore no warning was necessary or desirable.

66. If a judge takes the view that some warning is desirable it is further a matter for the judge's discretion whether to direct the jury to look for some supporting evidence. The Court in Makanjuola expressly deprecated the suggestion that he or she should direct the jury as to the need for corroboration in the technical sense. In this case, the family submit, while it is possible that a Judge may have issued a warning, it does not necessarily follow that he or she would have directed the jury to look for supporting evidence.

67. In any event supporting evidence does exist in the form of the pleas of guilty of Andrea McKee and her former husband. Whilst her plea of guilty is not corroboration in the technical sense, it is supportive of her evidence against Atkinson and, the family submit, very persuasive in that regard. Further, her husband's plea of guilty does, it is submitted, qualify as corroboration proper. It is relevant and admissible(76) , it is credible(77) , and it is independent in the sense that it emanates from a source other than the evidence requiring corroboration(78) . The final requirement is that it must implicate the accused. The transcript of the sentencing hearing clearly sets out the Crown case against all the accused including Atkinson(79) . An accused who pleads guilty is taken to have accepted all the facts as asserted by the prosecution. By pleading guilty Michael McKee implicated his co-accused by accepting the Crown version of his role and the role of the other actors.

68. For the foregoing reasons, the family submit that Sir Alasdair Fraser was plainly wrong to withdraw the case against Atkinson and Hanvey. Given the basis upon which the decision was taken it is clear there was an abject lack of due diligence in examining the pertinent and relevant issues of fact and law in this case. Whilst the Director may not have been well served by those who

advised him and who dealt directly with the case, however the decision was his. He confirmed this in oral evidence and indeed accepted responsibility for decisions taken by others on his behalf(80) . Contrary to the Director's apparent belief the family are firmly of the view that the case against Atkinson continues to hold out a more than reasonable prospect of conviction.

DPP references

1. 10-02-09 p.2
2. ibid p. 8
3. 17591
4. ibid
5. 16-09-09 p.11
6. 17634
7. per Robert Cooke 15-09-09 p. 18
8. 80204 para. 7
9. 14-05-09 p. 63
10. 29-04-09 p. 100
11. 18342 para. 7-9
12. ibid para. 10
13. 18345 para. 2-3
14. ibid para. 4
15. 15-09-09 p. 67
16. ibid
17. 17634 2(b)
18. 01-05-09 p. 151
19. 18345
20. per Michael Irwin 80530
21. 18-09-09 p72
22. R v Epping and Harrow JJ [1983] QB 433
23. 18342
24. 18345
25. 81411 para. 6
26. 17633
27. 17639 para. 5
28. 17640
29. 18040
30. 18043
31. 18340
32. 18324
33. 13-05-09 p.13
34. ibid p. 21
35. R v Andrews [1987] AC 281 H.L.
36. 16-09-09 p73
37. 00700-00701
38. [1987] AC 281 H.L.
39. Valentine's NI Law.
40. R vSmith [1997] Cr App R 14
41. 18324
42. 00513

43. 17635
44. 18063
45. 00717
46. 17643
47. 09105
48. 08748
49. 34394
50. 81020 para 13
51. 33910
52. 81021 para 16-17
53. 81022 para. 19
54. 33911 para 17
55. 34061
56. 81022 para. 20
57. 81023 para 21
58. 34042
59. 82017 para. 10-11
60. 34043
61. 81260
62. ibid
63. 81295
64. 33912
65. 33915
66. 33886
67. 33911
68. 17-09-09 p18
69. 18-09-09 p12
70. 18-09-09 p.91
71. 33918 para. 18
72. 33913 para. 30
73. 33980
74. R v Sayers & otrs (1985) unrep
75. [1995] 1 WLR 1348
76. R v Scarrott [1978] QB106
77. DPP v Kilbourne [1973] AC 729
78. R v Whitehead [1929] 1KB 99
79. 20098
80. 18-09-09 p 87

Submissions by the Public Prosecution Service

1. The PPS submits that the decision to abandon the prosecution of Atkinson and others did not shape the investigation into Robert Hamill's murder in the sense that in consequence of this decision, further or other investigative steps would or should have been taken. Inquiry Counsel has suggested that if a prosecution had continued to a successful conviction, this may have led Atkinson to provide information or evidence against Hanvey (on the basis that the alleged tipping off implied that Atkinson had relevant evidence to give about Hanvey's involvement in the murder). The PPS submits that this is far too speculative to form the basis of a finding that the decision "shaped" the

continuing investigation into Robert Hamill's death. The highest the matter can be put by Inquiry Counsel is that it is "possible" that if prosecuted to conviction Mr Atkinson "may" have testified against Hanvey. Leaving aside the fact that this proposition is purely hypothetical, the PPS points out that (a) there is no evidence on which the Panel could properly find that Mr Atkinson had any direct evidence to give about Hanvey's involvement in the murder (b) the suggestion that he might be willing to give that evidence if he were prosecuted to conviction is inherently unlikely.

2. In any event, for the reasons outlined above, the Terms of Reference do not permit any determination of the merits of the ODPP's decision to discontinue the prosecution.

Potential Criticisms or Adverse Inferences

Eleanor Atkinson:

- Gave a false account to the RUC about a telephone call made to the home of Allister Hanvey on 27 April 1997.

Robert Atkinson:

- Entered into a conspiracy with his wife and the McKees to cover the telephone call of 27 April 1997.
- Warned Allister Hanvey to destroy the clothing that he wore on 27 April 1997.

Stacey Bridgett:

- Participated in the attack on Robert Hamill.

Dean Forbes

- Participated in the attack on Robert Hamill.

Sir Alasdair Fraser

- Failed to heed the fact that Mr Simpson QC was unable properly to address the question whether Andrea McKee could be lying about Pendine, but nonetheless credible about the substance of her evidence, because no steps had been taken to test her account of the child's illness in the period prior to the weekend of 19th – 21st December.
- Failed to have regard to all the factors which suggested that Andrea McKee would have been a credible witness, including the number of times in which she had consistently maintained her account, both under caution and otherwise.

Allister Hanvey

- Participated in the attack on Robert Hamill.

- Provided the RUC with a false account of his movements and his clothes.
- Destroyed the clothing that he was wearing at the time of the attack.

Elizabeth Hanvey
- Gave a false account of Allister Hanvey's attire, movements and actions on 27 April 1997.

Kenneth Hanvey
- Gave a false account of Allister Hanvey's attire, movements and actions on 27 April 1997.

Thomas Hanvey
- Gave a false account of Allister Hanvey's attire, movements and actions on 27 April 1997.

Marc Hobson
- Participated in the attack on Robert Hamill.

Raymond Kitson
- Failed to direct that Stacey Bridgett be interviewed about his blood being on Mr Hamill's jeans.
- Failed to consider whether further scientific evidence should have been sought in relation to the pattern of that blood.
- Failed to give adequate consideration to the admissibility of what Res Con Silcock heard at the scene in relation to Stacey Bridgett.
- Failed to give adequate consideration to charges of affray.

Maynard McBurney
- Failed to ensure that the investigation into the murder of Robert Hamill was conducted with due diligence and/or conducted the investigation so as to protect Allister Hanvey and Robert Atkinson.

Andrea McKee
- Provided false information at the meeting in Seagoe.
- Coerced Tracey Clarke into giving a false statement to the RUC about the murder of Robert Hamill and the tip-off allegation against Robert Atkinson.
- Falsely accused Robert Atkinson of conspiring to pervert the course of justice.
- Gave false evidence about the above to the Inquiry.

Ivor Morrison
- Failed to direct that enquiries be made to check Andrea McKee's account of her son's illness in the period leading up to the weekend of the 19th -21st December 2003
- Failed to heed the fact that Mr Simpson QC was unable properly to address the question whether Andrea McKee could be lying about Pendine but nonetheless credible about the substance of her evidence, because no steps had been taken to test her account of the child's illness in the period prior to the weekend of 19th – 21st December.

- Failed to have regard to all the factors which suggested that Andrea McKee would have been a credible witness, including the number of times in which she had consistently maintained her account, both under caution and otherwise.
- Failed to have regard to the likelihood of a jury believing that Andrea McKee properly pleaded guilty to the conspiracy with Mr Atkinson.